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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1522

R. B. POTASHNICK,
CONTINENTAL CASUALTY COMPANY, and
J. B. CONVERSE AND COMPANY, INC.,
Petitioners,

versus

PORT CITY CONSTRUCTION COMPANY,
UNITED STATES FIDELITY AND GUARANTY COMPANY,
and THE CITY OF MOBILE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. B. Potashnick and Continental Casualty Company (hereinafter referred to collectively as "Potashnick"), and J. B. Converse and Company, Inc. ("Converse"), the petitioners herein, petition this Court for a Writ of Certiorari to review the decision in this case

rendered on January 15, 1980, by the United States Court of Appeals for the Fifth Circuit. That decision reversed the opinion and judgment thereon rendered on March 26, 1976, by the United States District Court for the Southern District of Alabama in favor of petitioners and also reversed the subsequent amended opinion and order on limited remand entered on June 1, 1978, by Judge William Stafford of the United States District Court for the Northern District of Florida denying a motion for new trial. Judge Stafford had been specially appointed to consider the motion for new trial which was based on the contention that the trial judge should have recused himself.

I.

OPINIONS BELOW

The opinion of the Court of Appeals below is reported at 609 F.2d 1101 (5th Cir. 1980) and is reproduced as Appendix A. The original decision of the District Court of March 26, 1976, as amended May 11, 1976 (hereinafter sometimes referred to as "Judge Hand's opinion") is unreported and reproduced as Appendix B. The Court of Appeals order of September 20, 1976, remanding the case for the limited purpose of hearing the motion for new trial filed by Port City Construction Company ("Port City") is reproduced as Appendix C. The amended opinion and order on limited remand of the District Court of June 1, 1978, (hereinafter sometimes referred to as "Judge Stafford's opinion") is reproduced as Appendix D. The Court of Appeals judg-

ment of January 15, 1980, is reproduced as Appendix E. The Court of Appeals letter of February 14, 1980, advising of denial of petition for rehearing is reproduced as Appendix F. The Court of Appeals letter of February 28, 1980, advising of grant of stay of issuance of mandate is reproduced as Exhibit G. Petitioners have filed a motion in the Court of Appeals requesting that said stay be extended until April 13, but the motion has not been acted upon prior to preparation of this petition.

II.

JURISDICTION

The decision of the Court of Appeals was rendered on January 15, 1980, and petitions for rehearing filed by petitioners were denied on February 14, 1980. Thereafter, on February 28, 1980, the Court of Appeals, at petitioners' request, stayed issuance of its mandate to and including March 29, 1980, and on March 19, 1980, an unopposed motion for a further stay of issuance of the mandate until April 13, 1980 was requested. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

III.

QUESTIONS PRESENTED

1. In light of the provision of the Disqualification of Judges Act, Pub. L. 93-512, 88 Stat. 1609, stating the "Act shall not apply to the trial of any proceeding commenced prior to the date of this Act", did the Court of

Appeals err in holding, contrary to all holdings of courts in other circuits considering the question, that the provisions of the Act did apply to this case which was commenced prior to the date of the Act?

2. Does 28 U.S.C. §455(a), *as amended*, which governs the disqualification of judges, require a judge to exercise discretion in favor of disqualification if he has *any* question about the propriety of his sitting in a particular case, or instead must he disqualify himself only if his impartiality might *reasonably* be questioned?

3. Did the Court of Appeals comply with the established scope of review, as clearly expressed in legislative history, in concluding that Judge Hand abused his discretion in failing to recuse himself, or was that conclusion legally impermissible due to the well supported factual conclusions of Judge Stafford, who had found, after a hearing pursuant to the Court of Appeals' limited remand of the case, that there was no reasonable basis to question Judge Hand's impartiality?

4. Does 28 U.S.C. §455(b)(5)(iii) require that a judge must *always* as a matter of law disqualify himself in any proceeding in which a law firm appears that has as a partner a relative of the judge within the third degree even though that relative is not acting as a lawyer in the proceeding and is for all practical purposes retired?

5. Should the opinion of this Court in *Geders v. United States*, 425 U.S. 80 (1976), be extended from its factual situation involving total prohibition by the trial court of all communication between a defendant and his counsel in a criminal case to a distinctly different factual situation involving a rule by the trial court in a civil case that restricted counsel from conferring with a corporate party's president about his testimony during the period he was on the stand even though unimpaired communication even at that time was available with another corporate agent, who was the corporation's representative at the trial?

6. Did the Court of Appeals violate the most fundamental rule of appellate procedure in reversing the trial court based on an alleged error which the appellant did not raise at the trial level, especially since the trial court had *sua sponte* offered appellant a mistrial at the time the alleged error became apparent, which the appellant refused to accept?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Prior to December 5, 1974, 28 U.S.C. §455 provided as follows:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

This statute was amended by the Disqualification of Judges Act, Pub. L. No. 93-512, 88 Stat. 1609. Section 3 of the Act governs its applicability to litigation pending at that time and provides as follows:

> This Act shall not apply to the trial of any proceeding commenced prior to the date of this Act, nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act.

28 U.S.C. §455, *as amended* (1974), now provides in pertinent part as follows:

> §455. *Disqualification of justice, judge, magistrate, or referee in bankruptcy*
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which

his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

. . . .

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

. . . .

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

. . . .

. . . .

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

. . . .

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground

for disqualification enumerated in subsection (b). Where a ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

V.

STATEMENT OF THE CASE

This case was filed by Potashnick against Port City and its bonding company, United States Fidelity and Guaranty Company ("USF&G"), on October 5, 1973. Jurisdiction was based upon diversity of citizenship between plaintiff and defendants as provided for in 28 U.S.C. §1332. Port City counterclaimed against Potashnick and his bonding company, Continental Casualty Company, and Potashnick filed third-party complaints on the counterclaim against Converse and the City of Mobile. The City cross-claimed against Converse and counterclaimed against Potashnick.[1]

The case was initially assigned to the docket of Judge W. Brevard Hand and remained on his docket until after trial and judgment. Potashnick was represented

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1 The case was consolidated for trial with another proceeding arising out of the same construction project and instituted by USF&G as plaintiff against Port City, several individual indemnitors on Port City's bond, and W. D. Brunson, a subcontractor of Port City. The trial court's judgment in this companion case was affirmed by the Fifth Circuit in the decision sought to be reviewed and is not relevant to this petition.

by the law firm of Hand, Arendall, Bedsole, Greaves & Johnston ("Hand, Arendall"); Paul W. Brock, a partner in that firm, was chief trial counsel.

The trial of the case commenced on August 4, 1975, before Judge Hand and a jury. During the testimony of the first witness presented by Potashnick, Judge Hand informed counsel for all parties that the attorneys were not to discuss with any witness the testimony of that witness at any time between the time the witness commenced testifying and the time he completed his testimony.[2] No party objected to the judge's rule, and as a result, counsel for petitioners complied with the rule throughout the trial of the case. Port City's counsel, however, was discovered to have violated the rule by discussing with B. G. Quinnelly, president of Port

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2 Judge Hand's instruction, as quoted by the Court of Appeals, 609 F.2d at 1117, App. A at 37a, appears to prohibit any communication with the witness until the witness completed his testimony. Potashnick was the party presenting his case at the time of the instruction and the only party to present his case prior to Port City. Counsel for Potashnick understood at the time the prohibition as being limited only to the witness's testimony, and this was confirmed by the court as the intent of its instruction during subsequent *in camera* proceedings. Counsel for Port City stated during the *in camera* proceedings that he did not understand that the prohibition applied to communications with his client and thus he did not comply with the instruction regardless of the extent thereof prior to the *in camera* proceedings. He certainly understood the limited extent of the prohibition after the *in camera* proceedings as was reflected by the following quotation from Port City's brief filed in the Court of Appeals:

> In this case the Court's order deprived Port City and the Quinnellys of the right to confer with their attorney *about their testimony* . . . [Emphasis added.]

Additional comments in Port City's reply brief also acknowledged the limitation on the instruction to apply only to communications about the testimony of the witness.

City, his testimony during a recess which occurred between the commencement and completion of Quinnelly's testimony. Potashnick moved to disqualify Quinnelly from testifying due to the violation. During a lengthy hearing in chambers, counsel for Port City also admitted violating another of the court's rules prohibiting counsel from informing a witness who had not testified of the testimony of a prior witness by referring to that witness by name. Potashnick moved to disqualify this witness also. Judge Hand indicated that he would disqualify Quinnelly from testifying further and would prohibit the other witness from testifying on matters with respect to which the rule had been violated. Even then Port City did not object to the court's rule limiting counsel-witness communications but objected only to the sanctions imposed for its violations of the rules. Judge Hand offered to grant Port City a mistrial and to assign the case to a new judge for trial before another jury if Port City requested, but Port City did not accept this offer. Counsel for Port City's bonding company then suggested an alternative of proceeding without a jury. After all other parties and Judge Hand indicated that they would acquiesce in such a procedure, Port City waived its right to jury trial, requested the court to hear the case non-jury, and agreed not to object on appeal to the case being heard non-jury. Trial of the case then resumed, and after 33 days of actual trial the case was concluded. Judgment was entered by the court on March 26, 1976, in favor of Potashnick and Converse and against Port City, USF&G, and the City. A motion for new trial was filed

by Port City and USF&G and denied, and the case was subsequently appealed.

After filing its notice of appeal, Port City filed a motion in the Court of Appeals for a limited remand to allow it to file a motion to recuse Judge Hand and for a new trial. The Court of Appeals remanded the case and it was assigned to Judge William Stafford of the Northern District of Florida. After a hearing, Judge Stafford entered an amended opinion on June 1, 1978, denying the motion for new trial, finding that there was no reasonable basis to question Judge Hand's impartiality and that Judge Hand's father did not have an interest which could have been substantially affected by the outcome of the case. Judge Stafford's order was then appealed and that appeal was consolidated in the Court of Appeals with the earlier appeal from Judge Hand's judgment.

The Court of Appeals' opinion did not deal with the merits of the litigation in any manner, and thus it is unnecessary to set forth the facts relating to the merits. Certain facts as established in various affidavits filed in connection with the recusal issue, however, are relevant and must be set forth.

Judge Hand was a partner in the Hand, Arendall law firm prior to his appointment to the bench in 1971, and, while he was a partner, he, Brock and others obtained small undivided interests in several parcels of real estate. These investments have been of a passive

nature, and neither Brock nor Judge Hand has had any active management in the property, which has always been managed by professional managers or developers. Brock and Judge Hand have made no joint investments since Judge Hand was appointed to the bench. The two lawsuits referred to in the next paragraph arose out of these investments.

In the *Blackman v. Lurlyne Land Co.* lawsuit referred to in the Court of Appeals opinion, neither Brock nor Judge Hand was named as a defendant. In settling the lawsuit, Brock prepared a release which released not only the defendants in the lawsuit but also the owners of the adjacent property, including Judge Hand and Brock. Neither Brock nor Judge Hand contributed to the money paid in settlement nor to any expenses of the litigation, and Judge Hand *was not even consulted* regarding the settlement or the release. With respect to the *Hufstutler v. Lurlyne Land Co.* lawsuit, also referred to by the Court of Appeals, neither Judge Hand nor Brock was a party until four days prior to the judgment in *Potashnick* (approximately five months after the trial), at which time the complaint was amended to add Brock and Judge Hand. Coincidentally, in the late afternoon of the day of the judgment in this case, Brock wrote the newly named defendants in *Hufstutler*, informing them of the amended complaint, suggesting that they contact their insurance carriers for defense, and offering to enter an appearance to prevent default until they could determine coverage. The letter could not have been received by Judge Hand until after his opinion had

already been entered by the clerk. Only after motion for new trial in *Potashnick* had been denied, did Brock make an appearance in *Hufstutler* on behalf of all new defendants, including Judge Hand. No party involved in *Potashnick* was in any way involved in the *Hufstutler* or *Blackman* cases, both of which were in state court, and there is absolutely no relationship between the *Potashnick* case and either of these cases or any of the property in which Judge Hand or Brock has an interest.

Charles C. Hand, Judge Hand's father, who was born in 1890, was the senior partner of Hand, Arendall during the pendency of this case, but at all times after Judge Hand's appointment to the bench, he had no fixed office hours, had limited participation in the affairs of the firm, and never received over 1% of the firm's income. Prior to entry of judgment in this case, his income changed to a fixed amount rather than a percentage. Hand, Arendall's fee arrangement in this case was not on a contingent basis but rather was on a fixed hourly basis with all accrued fees being billed monthly and paid promptly.

The Court of Appeals held that the 1974 amendments to 28 U.S.C. §455 applied to the question of Judge Hand's recusal although the case was commenced prior to the effective date of the amending act and further held pursuant to the amended statute that Judge Hand had abused his discretion in failing to disqualify himself. The Court of Appeals also extended the holding of this Court in *Geders* to the present very

different factual situation and *completely ignored* Potashnick's argument that Port City had waived any due process contentions pursuant to *Geders* by its failure to object and by its refusal to accept the mistrial offered by Judge Hand *sua sponte*. Based on these determinations, the Court of Appeals reversed the case and remanded it for a new trial before a jury and a different judge, which was precisely the same relief the trial court had offered to appellant during the trial.

VI.

ARGUMENT

1. The Court of Appeals' application of the 1974 amendments to 28 U.S.C. §455 violates the clear congressional mandate and also conflicts with all decisions of other courts of appeal.

The Disqualification of Judges Act, Pub. L. 93-512, 88 Stat. 1609 ("the Act") was enacted on December 5, 1974, significantly revising 28 U.S.C. §455 in a manner so as to provide more stringent guidelines for recusal. Section 3 of the Act governs its applicability to litigation pending on its effective date and provides as follows:

> This Act shall not apply to the trial of any proceeding commenced prior to the date of this Act, nor to appellate review of any pro-

ceeding which was fully submitted to the reviewing court prior to the date of this Act.

This case was commenced on October 5, 1973, well prior to the effective date of the Act. In spite of the clear language of the Act and the acknowledged substantial jurisprudence in other circuits holding that the provisions of the Act are inapplicable to cases commenced prior to the effective date of the Act even though tried after that date, the Fifth Circuit held that, since this case was not tried until after the effective date of the Act, application of the provisions of the Act was mandated by the court's prior decisions in *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Parrish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); and *Fredonia Broadcasting Corporation, Inc. v. RCA Corporation*, 569 F.2d 251 (5th Cir.), *cert. denied*, 439 U.S. 859 (1978).

It is significant to note that, contrary to the present case, no party was aggrieved in the prior Fifth Circuit cases by the erroneous application of the new act since, in *Davis* and *Parrish*, the court held that recusal was not required under the amended version, and in *Fredonia* it held that recusal was required under either version. Further, even the Court of Appeals acknowledged that its prior decisions were confused.[3]

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3 609 F.2d at 1110 nn. 4 & 5, App. A at 18a-19a.

In opposition to the confused holdings of the Fifth Circuit, there is not only the clear and unequivocal mandate of Congress as expressed in §3 of the Act, but also total uniformity of jurisprudence in other circuits, including decisions of the Courts of Appeals for the Second,[4] Fourth,[5] and District of Columbia[6] Circuits and of the District Courts for the Southern District of New York,[7] the Eastern District of Michigan,[8] the District of South Carolina,[9] and the Western District of Pennsylvania,[10] all of which support petitioners' position on this question.

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4 *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 958 n. 9 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *In re Continental Vending Machine Corp.*, 543 F.2d 986, 995 n. 4 (2d Cir. 1976).

5 *In re Virginia Electric and Power Co.*, 539 F.2d 357, 361-62, 366 (4th Cir. 1976).

6 *United States v. Haldeman*, 559 F.2d 31, 130 n. 284 (D.C. Cir. 1976), *cert. denied* 431 U.S. 933 (1977), supports petitioners' position but in a slightly different context.

7 *United States v. International Business Machines Corp.*, 475 F.Supp. 1372, 1388 (S.D.N.Y. 1979).

8 *Bradley v. Milliken*, 426 F.Supp. 929, 932 (E.D. Mich. 1977).

9 *Duplan Corp. v. Deering Milliken, Inc.*, 400 F.Supp. 497, 505 (D.S.C. 1975).

10 In *Samuel v. University of Pittsburgh*, 395 F.Supp. 1275, 1277 (W.D. Pa. 1975), *vacated on other grounds*, 538 F.2d 991 (3d Cir. 1976), the court concluded that the amendment was not applicable to a case commenced prior to the effective date of the Act, but, nevertheless, proceeded to consider the amended statute because of its more liberal provisions. Such a determination might have been well justified in *Samuel* where the recusal question was presented to the court prior to trial, but it would certainly be a poor exercise of discretion when the recusal question is not presented until after an adverse judgment as in this case.

This jurisprudence is best summed up by Chief Judge Edelstein in *United States v. International Business Machines Corp.*, 475 F.Supp. 1372, 1388 (S.D.N.Y. 1979), wherein he stated as follows:

> . . . Where the proceeding commenced before and the trial commenced after the Act's effective date, the date of the proceeding is determinative and the pre-1974 statute applies. [Citing authorities set forth in footnotes 4, 5, 8, and 9, *supra*.]

The Court of Appeal's erroneous application of the 1974 amendments was clearly determinative of the outcome of the recusal question, since, under the prior jurisprudence in the Fifth Circuit,[11] Judge Hand certainly would not have been considered as abusing his discretion in not recusing himself, especially since he was not asked to recuse himself, and since the issues subsequently raised undoubtedly never even crossed his mind as having any bearing on his impartiality or even the appearance of his impartiality. Nor was there ever any allegation of any bias or prejudice in fact.[12]

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11 *Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965); *Kinnear-Weed Corporation v. Humble Oil & Refining Company*, 441 F.2d 631, 635 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971), *aff'g* 324 F.Supp. 1371, 1386 (S.D. Tex. 1969).

12 609 F.2d at 1112, App. A at 25a.

2. The Court of Appeals erroneously interpreted amended §455(a) so as to eliminate the trial court's exercise of discretion if there is *any* question as to his impartiality, whether that question be reasonable or not.

Although the Court of Appeals' opinion discusses at some length the issue of whether or not Judge Hand should have recused himself pursuant to amended §455(a), the rationale of its holding is clearly contained in the following statement:

> . . . [T]he new statute requires a judge to exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case.[13]

The problem with this interpretation is twofold. First, discretion is eliminated by directing which of two alternatives must be chosen. Second, the statutory test is that judge's impartiality must be "reasonably . . . questioned," which is obviously a grossly different test from the Fifth Circuit's test which only requires "any question." The legislative history of the Act clearly reflects Congress' intention that great emphasis be placed upon the requirement of reasonableness in applying §455(a).[14] The requirement of reasonableness in the

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13 609 F.2d at 1112, App. A at 23a.

14 H.R.Rep. No. 93-1453, 93rd Cong., 2nd Sess. (1974), U.S. Code Cong. & Admin. News, 6351, 6354-55. That portion of the house report concerning §455(a) is set forth in App. H.

application of §455(a) is clearly set forth in the Fourth Circuit's opinion in *United States v. Sellers*, 566 F.2d 884, 886-7 (4th Cir. 1977), and, in fact, in the earlier Fifth Circuit opinion in *Parrish, supra* at 103-04.

The relevant facts to which the law must be applied in this case are simple. Judge Hand and Paul Brock owned small undivided interests in *passive* investments, managed by others, which investments had been made long prior to Judge Hand's being appointed to the bench. During the pendency of the *Potashnick* case, Brock prepared a release in connection with settlement of the *Blackman* case in which release Judge Hand and several others were named as persons released although they were not parties to the lawsuit and although Judge Hand *was not even consulted* about the release. Coincidentally, on the date that Judge Hand's judgment was entered in the *Potashnick* case, Brock wrote Judge Hand and several other newly named defendants in the *Hufstutler* case offering to enter a courtesy appearance on their behalf until they could determine whether or not they had insurance coverage for the allegations against them. *This offer could not have been received by Judge Hand prior to entry of judgment in this case.* While it is barely conceivable that these facts could create "any question" about Judge Hand's sitting in the case, it borders on incredibility that they provide a sufficient basis for a conclusion that Judge Hand *abused his discretion* in failing to conclude that "his impartiality might *reasonably* be questioned."

Unless reversed, this holding, coupled with the ignored scope of review and the determination as a matter of law on the issue of the judge's lawyer relative discussed *infra*, will certainly result in many trial judges unnecessarily recusing themselves out of a fear of reversal after a lengthy trial. Such action will seriously affect the orderly and efficient administration of justice. This Court has not heretofore discussed the Act, now over five years old, and a resolution of the issues presented in this petition would significantly aid the bench and bar in correctly applying this most important legislation in the future.

3. The Court of Appeals' conclusion that Judge Hand abused his discretion in failing to disqualify himself was not legally permissible due to the well supported factual conclusions of Judge Stafford who had found, after a hearing pursuant to the Court of Appeals' limited remand of the case, that there was no reasonable basis to question Judge Hand's impartiality.

The proper scope of review in determining whether or not the trial judge erred in failing to disqualify himself is the same under the new statute as it was under the old. This was made amply clear in the House Report concerning the statute.[15] The Court of Appeals acknowledges that its scope of review is limited to the question of whether or not the lower court abused its

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15 House Report, *supra*, note 14, App. H at 2h.

discretion, but then it merely pays lip service to that scope of review.

The Court of Appeals for the Second Circuit has indicated what is meant by abuse of discretion with respect to review of decisions regarding recusal by stating as follows:

> The statute makes the exercise of sound judicial discretion by the judge the test in such circumstances, and if his decision is not shown to have been arbitrary or capricious, there is no abuse of discretion calling for reversal.[16]

The Court of Appeals for the Ninth Circuit has defined "abuse of discretion" as follows:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.[17]

The contention that Judge Hand should have re-

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16 *Voltmann v. United Fruit Co.*, 147 F.2d 514, 517 (2d Cir. 1945).

17 *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942).

cused himself was not raised by Port City until after an adverse judgment. The timing alone should be a significant factor in the resolution of the question.[18] In response to Port City's motion for limited remand, the Court of Appeals remanded the case to the District Court in order that a hearing could be held on the motion for new trial.[19] After considering all of the evidence submitted, Judge Stafford concluded that there was no reasonable basis to question Judge Hand's impartiality.[20] It is significant to note that Judge Hand had himself offered to recuse himself during a pre-trial conference because of his prior association as a partner in the Hand, Arendall firm[21] and again during the *in camera* proceedings as set forth above in the Statement of the Case. In light of Judge Stafford's conclusion that there was no reasonable basis to question Judge Hand's impartiality and in further light of Judge Hand's offer on two separate occasions to recuse himself, it is inconceivable that his failure to recuse himself could be characterized as an abuse of discretion since, for there to be an abuse of discretion, his action must have been arbitrary, capricious, fanciful, or unreasonable. Yet without more than a statement that it did not agree with the conclusion of Judge Stafford to the contrary, the Court

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18 The House Report, *supra* note 14, cautions judges against the possibility of litigants seeking to avoid an expected adverse decision. In the present case, this fear had become a reality before Port City moved. See *In re United Shoe Machinery Corporation*, 276 F.2d 77, 79 (1st Cir. 1960).

19 App. C.

20 App. D at 7d-11d.

21 609 F.2d 1114.

of Appeals held that Judge Hand abused his discretion. This conclusion is clearly wrong as a matter of law since at least one reasonable man, Judge Stafford, "[took] the view adopted by the trial court."[22]

4. A partner in a law firm does not as a matter of law *always* have an interest that could be substantially affected by the outcome of a proceeding in which his firm appears so as to require the disqualification of a judge related to the partner.

Due to Port City's failure to raise the issue until after an adverse judgment (although it was aware of the relationship *ab initio),* the Court of Appeals refrained from determining whether or not Port City had waived its contention that Judge Hand was disqualified because his father was a partner in the Hand, Arendall law firm.[23] Nevertheless, it did hold as a matter of law that "when a partner in a law firm is related to a judge within the third degree, that partner will always be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's law firm."[24] This conclusion was reached by the Court of Appeals despite its correct determination that Judge Hand's father was not "act-

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22 *Delno, supra* n. 17, at 967.

23 609 F.2d at 1115, App. A at 32a-33a.

24 609 F.2d at 1113, App. A at 26a.

ing as a lawyer" within the meaning of 28 U.S.C. §455(b)(5)(ii), in accordance with its earlier decision in *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). In the *Equifax* case, the Court had held that an associate of a law firm, who was the son of the judge, did not have such an interest that could be substantially affected by the outcome of the proceeding. While it is obvious that the interest of an associate in the success of cases handled by a law firm can and usually would be significantly different from the interest of the average partner, the result reached in this case is totally unsupportable. Judge Hand's father was 80 years old when Judge Hand was appointed to the bench in 1971, and, as set forth in the Statement of the Case above, he was for all practical purposes retired, although greatly revered by his partners. Hand, Arendall's fee in this case was not affected, substantially or otherwise, by the outcome of the proceeding. However, all of these facts were deemed legally irrelevant by the Court of Appeals. It is totally illogical to conclude that an inactive partner in his 80's has a greater interest in the outcome of a case tried by the law firm than does a young associate who can reasonably be assumed to be looking forward to spending substantially all of his entire legal career with the firm. The decision in this case by the Court of Appeals, however, draws that precise illogical conclusion.

The determination of disqualification under §455(b)(5)(iii) as a matter of law is contrary even to *SCA*

Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977), which held that the trial judge was disqualified due to the appearance of his brother's law firm *only after a factual determination* that the brother had an interest that could be substantially affected by the outcome of the proceeding. In its opinion, the Seventh Circuit correctly noted that such a factual determination on a case-by-case basis was required by the legislative history of the Act.

5. **The Court of Appeals erred in extending the holding of this Court in *Geders* from its factual situation involving total prohibition of all communication between a defendant and his counsel in a criminal case to a distinctly different factual situation involving a rule in this civil case that restricted counsel from conferring with a corporate party's president about his testimony during the period he was on the stand even though unimpaired communication even at that time was available with another corporate agent, who was the corporation's representative at the trial.**

Although petitioners and Port City did not agree on much in their briefs filed below, they did agree that the trial court's instruction regarding communication with witnesses did not prohibit all communication between counsel and the witness but rather only prohibited

communication about the witness's testimony. Nevertheless, the Court of Appeals chose to ignore the correct facts as agreed to by the parties and based its opinion upon its own erroneous determination that the trial court's instruction prohibited all communication between counsel and the witness. In the *Geders* opinion, this Court discussed this distinction at some length[25] and chose in its concluding expression of its holding to emphasize again the distinction, by stating as follows:

> We hold that an order preventing petitioner from consulting his counsel *"about anything"* during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment. [Quotation marks in the original; italics added.][26]

While the Court of Appeals did not ignore petitioners' argument regarding the corporate status of Port City, it did miss completely the thrust of the argument.[27] Port City, like any other corporation, can obviously act only through its officers and agents, and communication between its attorney and high ranking officers or agents of the corporation would qualify to invoke the attorney-client privilege. From these two

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25 425 U.S. at 83 n. 1.

26 425 U.S. at 91.

27 609 F.2d at 1119, App. A at 43a-44a.

premises, the Court illogically reached the conclusion that a prohibition against communication by counsel with *one* of the corporation's agents constituted a prohibition of communication between counsel and the corporation. Port City, however, clearly had two agents who could communicate on behalf of the client. Mr. Quinnelly was the president and sole stockholder of the corporation and clearly spoke for it. The bookkeeper, who was also in effect the office manager, was present on behalf of the corporation, sitting at counsel table throughout the entire trial, and during most of the time was the agent of the corporation available for communication with counsel. A review of her testimony, which is approximately 375 pages in length, will clearly reflect that by virtue of her position, along with her experience in the construction industry, she was certainly an agent of the corporation with sufficient authority to communicate with counsel. Since counsel for Port City was always free to communicate without any restriction with the agent of Port City who was not on the witness stand, there certainly was no order preventing consultation between counsel and client so as to justify the application of the rule announced by this Court in *Geders*.

A reading of the *Geders* opinion leads one to believe that this Court was very cognizant of the fact that it was reviewing a decision in a criminal case, in which the trial court, as an arm of the government, should be appropriately limited in its power to conduct the proceedings adversely to the interest of the defendant.

Much more latitude is properly given to the trial judge in conducting a civil trial, where life and liberty are not at stake and where the parties are on an equal footing with each other. These critical distinctions should cause great hesitancy in applying rules hammered out in criminal cases in a manner that will limit the authority of the trial court in civil cases from instituting courtroom procedures applying equally to all parties which are designed and tailored by the trial judge to reach a just and true result in an orderly and efficient manner. The rule applied by the trial court in this case limiting communication between counsel and the witness on the stand was clearly an allowable courtroom procedure which did not exceed the proper limits in a civil case.

6. **The Court of Appeals violated the most fundamental rule of appellate procedure in reversing the trial court based upon its extension of the rationale of *Geders* to an alleged error which the appellant did not raise at the trial level, especially since the trial court had *sua sponte* offered appellant a mistrial at the time the alleged error became apparent, which appellant refused to accept.**

The Court of Appeals' opinion, in ruling that the judgment should be reversed pursuant to *Geders* on the basis of an alleged impingement of right to counsel, *totally ignores* the arguments made to it by petitioners

that Port City never objected in the trial court to the judge's ruling about which it complained on appeal and that Port City declined to accept a mistrial offered *sua sponte* by the trial court. As pointed out in the Statement of the Case above, Port City did not object at any time to the trial court's rule limiting communication between counsel and witnesses but rather objected only later to the sanctions imposed by the court for Port City's violations of the rule. To allow Port City to raise the issue for the first time on appeal after an unfavorable judgment is contrary to well established appellate procedure, even if the issue is a constitutional one.[28]

Even more significant, however, was Port City's refusal to accept the trial court's offer to "mistry this case and get another judge to try it in the future" after Port City objected to the sanctions which the court stated it would impose as a result of Port City's disregard of its instructions. The problem in this case grew out of Port City's violations of rules applied equally to all parties; since no party objected to the rules, the petitioners complied with them. Nevertheless, the Court of Appeals' opinion gives Port City, the guilty party, a new trial now, which is exactly what it was offered at the time it was caught violating the trial court's rules, and deprives petitioners, the innocent parties, of a judgment in their favor. The lack of justice in this result, which certainly is not required by the Due Process

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28 *Stewart v. Banks*, 397 F.2d 798 (5th Cir.), *cert. denied*, 393 U.S. 801 (1968).

Clause, is obvious. Port City's refusal to accept the offered mistrial was a tactical decision with which it should be required to live.[29]

Counsel for petitioners have been unable to find any decision of this court or of any other federal court specifically considering the effect of a party's refusal of a mistrial offered by the court *sua sponte*. However, the Supreme Court of Mississippi has clearly stated that the refusal of the offer of a mistrial operates as a waiver of the alleged error.[30] In a somewhat analogous situation, the Eighth Circuit stated as follows:

> . . . It seems, however, that plaintiffs' counsel preferred to let the action of the trial court stand, not seek a mistrial at this point, yet retain this incident as his "ace in the hole". After receiving an unfavorable verdict, he now attempts to revive this alleged error. It is the most fundamental rule of appellate procedure that a party may not sit idly by and allow the trial court to commit error, wait for a verdict, and complain of the error only if the verdict is unfavorable. . . . Yet, in essence, this is what plaintiffs' counsel did. He chose not to move for a mistrial, apparently deciding not to press the issue and to continue with

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29 *Jenkins v. General Motors Corporation*, 446 F.2d 377, 382-83 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972).

30 *N.O. & N.R.R. Co. v. Weary*, 217 So.2d 274, 279 (Miss. 1968).

the trial. Plaintiffs are now bound by that decision.[31]

The error of the Court of Appeals discussed in this section does not present any new issue for this Court's determination since the basic principles relating thereto are well settled, but this error does constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

VII.

CONCLUSION

There are several special and important reasons why this Court should review the Court of Appeals' opinion in this case. The opinion conflicts with the opinions of other courts of appeal as to the retroactive application of 28 U.S.C. §455, *as amended*, as to the requirement of reasonableness required by 28 U.S.C. §455(a) in determining disqualification of the trial judge due to an appearance of impartiality, and as to the determination on a case by case factual basis of disqualification in proceedings involving the appearance of a law firm in which the judge has a relative. The opinion conflicts with the legislative history of the disqualification statute on the issues of reasonableness, scope of review, and case-by-case factual determination. The opinion decides important questions regarding this critical stat-

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31 *Skogen v. Dow Chemical Company*, 375 F.2d 692, 703 (8th Cir. 1967).

ute which have not been, but should be, settled by this Court. In addition, the opinion decides the important question of the extension of this Court's decision in *Geders* to a distinctly different factual context so as to unreasonably restrict the trial court's authority to establish necessary courtroom procedures in a civil case. Moreover, in reaching that question, the Court of Appeals violated the most fundamental rule of appellate procedure, since the alleged error had not only not been preserved in the trial court but had also been waived by the refusal of a mistrial offered by the trial court *sua sponte*.

Accordingly, petitioners respectfully urge the Court to grant this petition and to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) I have this ____ day of March, 1980, mailed three copies of the above and foregoing Petition for Writ of Certiorari, by United States Mail, postage prepaid, to Joseph J. Boswell, Esq., John D. Richardson, Esq., and William H. Brigham, Esq.

G. HAMP UZZELLE, III
P.O. Box 123
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Appendices

APPENDIX A

R. B. POTASHNICK, an Individual, and
Continental Casualty Company,
Plaintiff-Third Party Plaintiff,
Appellees-Appellants,

versus

PORT CITY CONSTRUCTION COMPANY
and United States Fidelity & Guaranty Co.,
Defendants-Appellants,

versus

The CITY OF MOBILE, ALABAMA,
Third-Party Defendant-Appellant,
Appellee,

versus

J. B. CONVERSE & COMPANY INC.,
Third-Party Defendant-
Appellee.

UNITED STATES FIDELITY
& GUARANTY COMPANY,
Plaintiff-Appellant,

Port City Construction Company, Inc., et al.,
Defendants-Appellants,

versus

W. D. BRUNSON, d/b/a W. D. Brunson
Construction Company,
Defendant-Appellee.

Nos. 76-2373, 78-2386.

United States Court of Appeals,
Fifth Circuit.

Jan. 15, 1980.

Appeals from the United States District Court for the Southern District of Alabama.

Before COLEMAN, Chief Judge, RONEY and FAY, Circuit Judges.

FAY, Circuit Judge:

The case began amid a flurry of claims, counterclaims, and cross-claims. The thirty-three day trial of the action spawned a record of twenty-five volumes as well as the eleven briefs submitted on appeal. Out of the morass emerge questions involving the right to the effective assistance of hired counsel in a civil case, and the disqualification of a trial court judge from participation in the proceeding before him. Our resolution of the issues requires us to reverse this case on two separate grounds.

Our first ground for reversal results from the trial court judge's failure to disqualify himself from participation in the proceeding before him. The judge in this case was involved in business dealings with the plaintiff's attorney. The judge's father was senior partner in

the law firm representing the plaintiff. The parties do not allege that the judge exhibited any actual bias or prejudice in the case; they assert only that under the circumstances his impartiality might reasonably be questioned.

A recently amended federal statute sets forth the applicable requirements for judicial disqualification. Relying on the legislative history and policy underlying the statute, we hold that the judge in this case was required to disqualify himself on grounds that either were not or could not be waived by consent of the parties. We therefore reverse the judgments in the main action of this lawsuit and order a new trial before a different judge. We affirm the judgment entered in the case consolidated with the main action for trial, since the disqualification of the judge arose out of circumstances unrelated to the consolidated lawsuit.

The second ground for reversal stems from the application of the trial court judge's rule prohibiting each witness from conferring with his or her attorney during breaks and recesses in the witness' testimony. One of the attorneys in the case violated this rule by talking to his client, a party to the action, during an overnight recess in the party-witness' testimony. The judge granted opposing counsel's motion to exclude further testimony by the party-witness, but the party-witness then agreed to waive trial by jury in lieu of excluding his testimony.

Our analysis of the fifth amendment to the United States Constitution establishes that a civil litigant has a constitutional right to retain hired counsel. Because the prohibiting of communication between a testifying party-witness and his attorney during an overnight recess in the party-witness' testimony impinges on that constitutional right, we are compelled to reverse. This second ground for reversal applies only to the main action of the lawsuit since the party raising this issue does not contest the judgment in the case consolidated with the main action for trial. We again affirm the judgment in the consolidated action.

I. The Facts and Proceedings

A. The Underlying Lawsuit

This convoluted multi-party diversity action arose out of the construction of an aerated lagoon for the City of Mobile, Alabama (City). On October 5, 1973, R. B. Potashnick (Potashnick), the general contractor for the lagoon project, filed a complaint against Port City Construction Company (Port City), a subcontractor hired to perform dirt work, and United States Fidelity and Guaranty Company (U.S.F. & G.), Port City's bonding company. Port City had left the project and plaintiff Potashnick sought recovery for the cost overrun he incurred in completing Port City's work. The complaint also asked for damages resulting from delay of the project caused by Port City's alleged unsatisfactory performance, and included a claim for re-

covery over of liquidated damages claimed against Potashnick by the City of Mobile, the owner of the project.

Port City and U.S.F. & G. answered the complaint, and Port City filed a counterclaim seeking damages against Potashnick and his bonding company, Continental Casualty Company (Continental). Port City's counterclaim asserted breach of implied warranty, misrepresentation, breach of contract by failure to pay on time, extra work over and above contractual obligations, anticipatory breach of contract, and extra work plus a modification of the contract. Potashnick and Continental answered Port City's counterclaim, denied liability, and filed a third-party complaint against the City and J. B. Converse and Co., Inc. (Converse), the engineering firm which designed the lagoon project and supervised its construction. The third-party complaint sought recovery against Converse and the City for breach of implied warranty, negligence in design, negligence in supervision, and misrepresentation. In addition, recovery was sought against the City alone for work over and above contractual obligations. Potashnick made a separate claim for recovery of the withheld retainage and payment due on the contract plus interest. Potashnick and Continental prefaced each of their jointly asserted claims against the City and Converse with the caveat that they strongly denied all claims by Port City and that the third-party complaints were asserted only on the alternative possibility that the court might find in favor of Port City on its claim against Potashnick and Continental.

The City answered the third-party complaint of Potashnick and Continental and filed a counterclaim against them seeking to recover liquidated damages as well as indemnity from Potashnick for any damages that might be awarded in favor of Potashnick and Continental against the City. The City also filed a cross-claim against Converse, the engineer, seeking indemnity from it on theories of negligence, breach of warranty, and misrepresentation. In its cross-claim the City emphatically denied that Converse had been guilty of negligence, breach of warranty, or misrepresentation but asserted its claim for indemnity solely on the basis that it was entitled to indemnity should the court find any merit to Port City's allegations.

The above claims were all asserted in the case of *Potashnick v. Port City Construction Co.* Consolidated with this case for trial was the case of *United States Fidelity and Guaranty Co. v. Port City Construction Co.* This second case was initially filed as an action by U.S.F. & G. seeking exoneration from liability on the labor and material bonds which it had entered into as surety for Port City on its contracts with Potashnick. Prior to trial, judgments were entered on all but one of the many labor and material claims asserted in that litigation. In addition, U.S.F. & G. obtained a judgment for indemnity on the master surety agreement against Port City and the indemnitors on that agreement. The remaining claim in the exoneration action was that of W. D. Brunson (Brunson), a supplier and subcontractor of Port City seeking to recover payment for the work he performed on the job. Brunson's counterclaim against

U.S.F. & G. and his cross-claim against Port City were transferred to the *Potashnick* action for further proceedings.

B. The Proceedings in the District Courts

Most of the issues raised in this appeal arise out of the actual proceeding which commenced on August 4, 1975 as a jury trial. Prior to the taking of any testimony, District Court Judge W. Brevard Hand instructed all witnesses, parties, and counsel that witnesses were not to discuss their testimony with anyone except counsel, and then only individually and out of the presence of other witnesses. The judge further instructed that no direct reference was to be made to one witness of the prior testimony of another witness. The stated purpose of these instructions was to avoid the programming of witnesses to rebut other witnesses' testimony. Record, vol. 12, at 47-49. Subsequently, during a break in the testimony of the first witness, the judge instructed that during recesses and breaks in a witness's testimony it would be highly improper for counsel to have any conversations with that witness until his testimony was complete. No objections were raised to this instruction. Record, vol. 13, at 652-53.

Several weeks into the trial, on September 23, 1975, the court was informed that counsel for Port City had violated the court's instructions by conversing with a testifying client-witness during a break in that wit-

ness's testimony. An in-chambers conference between the court and counsel revealed that counsel for some of the parties had not understood the judge's rule to prohibit an attorney from speaking with his own client in the process of testifying. Counsel for Port City disclosed that he had also violated the court's instructions by discussing a prior witness' testimony with two witnesses who had not yet testified. Record, vol. 21, at 4518-40. In response to a motion by counsel for Potashnick, Judge Hand indicated that the witnesses involved in each of Port City's rule violations would be disqualified from giving any further testimony in the case. The judge then said that he would be willing to grant Port City a mistrial if it so requested. One of the parties suggested as an alternative that the case be allowed to proceed without a jury in lieu of disqualifying Port City's witnesses. Port City's attorney, stating that his client's case would be greatly harmed by the disqualification of the witnesses and that his client could not afford a mistrial, moved to proceed without a jury. Record, vol. 21, at 4575. Judge Hand, along with several of the parties, refused to acquiesce in proceeding without a jury until Port City waived its right to jury trial and agreed not to object on appeal to the case being heard non-jury. *Id.* at 4580-85.

The case proceeded without a jury and concluded after thirty-three days of trial. In March, 1976 judgment was entered in favor of Potashnick and against Port City and U.S.F. & G.; in favor of Potashnick and against the City; in favor of Brunson against Port City

and U.S.F. & G.; and in favor of U.S.F. & G. against Port City and the indemnitors on the master surety agreement. Judgment was also entered in favor of Converse dismissing the claims against it of Potashnick, Continental, and the City; in favor of Continental, dismissing the claims against it of Port City and the City; and in favor of the City, dismissing the claim against it of Continental. Findings of fact and conclusions of law supporting the judgments were entered. Record, vol. 4, at 676-753. Subsequently, Port City, U.S.F. & G., the indemnitors, and the City filed notices of appeal; a limited notice of appeal was filed by Potashnick and Continental.

C. The Hearing on Remand: Was the Judge Disqualified?

Upon motion of Port City and the indemnitors, our court remanded the case for the limited purpose of determining whether District Court Judge W. Brevard Hand was disqualified to hear the case. In their Motion to Vacate Judgment and Order New Trial, Port City and the indemnitors argued that Judge Hand should have disqualified himself from trying the case because (1) the judge was so connected with Potashnick's law firm — Hand, Arendall, Bedsole, Greaves & Johnston (Hand, Arendall) — and with Potashnick's chief trial counsel, Paul Brock, that his impartiality might reasonably be questioned; (2) the judge was being personally represented in other matters by Hand, Arendall and by Brock; and (3) the judge's father was a partner in Hand,

Arendall. The movants did not claim that Judge Hand was biased in favor of or against any party; they questioned only the appearance of impartiality.

The motion to disqualify was heard by District Court Judge William Stafford, Jr. of the Northern District of Florida. Based on the affidavits, exhibits, and argument, Judge Stafford found that prior to his appointment to the federal bench, Judge Hand had practiced law in Mobile, Alabama. Judge Hand and Paul Brock had been partners in Hand, Arendall and they enjoyed an ongoing friendly relationship. During the time they were law partners Judge Hand and Brock would occasionally invest with clients and one or more other members of the firm in real estate to be held for future development. Most of these purchases occurred many years ago, prior to Judge Hand's appointment to the bench. The improved properties have always been managed by professional managers or developers with no active management by Judge Hand or Brock. During the period of time the *Potashnick* case was before Judge Hand, he and Brock did not make any joint investments, but several transactions took place involving property in which Judge Hand had a small interest. These transactions included the assignment of a mortgage and rents from an apartment building, and several conveyances of property interests. Additionally, in 1973 two lawsuits were filed in the circuit court of Mobile County relating to some property in which Judge Hand and Brock had an interest. The first of these suits, *Blackman v. Lurlyne Land Co.*, involved prop-

erty in which Judge Hand had previously held an interest. While the judge was not a named defendant and had no connection with the corporate defendants in the action, the release Brock prepared to settle the case included Judge Hand. The second lawsuit, entitled *Hufstutler v. Lurlyne Land Co.*, originally did not name Judge Hand as a defendant, but the complaint was subsequently amended to include Judge Hand, Brock, and others as defendants. On the day final judgment was entered in *Potashnick*, Brock wrote a letter to all the named defendants in *Hufstutler* informing them of the amended complaint and suggesting that they contact their insurance carriers. In that same letter Brock offered to make an appearance on behalf of the defendants to prevent default until they could determine their insurance coverage. On April 21, 1976, Brock filed such an appearance on behalf of all defendants; at that time Judge Hand had already denied the motion for new trial in *Potashnick*. Amended Opinion and Order on Limited Remand, Record, vol. 7, at 1579-84.

As to the relationship of Judge Hand's father to the Hand, Arendall firm, Judge Stafford found that Charles C. Hand was the senior partner of Hand, Arendall. At the time Judge Hand was appointed to the federal bench, his father was eighty years old and had limited participation in the affairs of the firm. During the time *Potashnick* was pending Mr. Hand received one percent of the firm's income, but at some point prior to the entry of judgment in the case his income was changed to a fixed amount unrelated to the income of

the firm. Judge Stafford's opinion also notes that Hand, Arendall's fee for its participation in *Potashnick* was at a fixed hourly rate from the inception. Accrued fees were billed monthly and paid promptly. *Id.* at 1586.

Judge Stafford ruled that the applicable statutory provision relating to judicial disqualification was the amended version of 28 U.S.C. §455.[1] Applying the relevant sections of the statute, Judge Stafford found no reasonable basis for disqualification of Judge Hand. Notices of appeal from Judge Stafford's opinion and order were filed by Port City and the indemnitors, and a limited notice of appeal was filed by R. B. Potashnick and Continental. The appeals from Judge Stafford's opinion and order have been consolidated with the appeals from Judge Hand's decision on the merits of the underlying lawsuit. We reverse in part and affirm in part on each of the consolidated appeals.

II. The Disqualification Issue

A. The Applicable Statute

At the time this lawsuit was instituted, the federal statute relating to judicial disqualification provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to

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1 28 U.S.C. §455 (1970) was amended by Act of Dec. 5, 1974, Pub.L. No. 93-512, §2, 88 Stat. 1609.

> or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. §455 (1970). While the case was pending, but prior to the commencement of trial, 28 U.S.C. §455 was amended to bring the statutory grounds for disqualification of judges into conformity with the recently adopted canon of the Code of Judicial Conduct[2] relating to disqualification of judges for bias, prejudice, or conflict of interest. *See* H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6352-54 [hereinafter cited as 1974 U.S. Code Cong. & Admin. News]. The amended version of 28 U.S.C. §455 reads as follows:

> §455. Disqualification of justice, judge, magistrate, or referee in bankruptcy
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or

2 Canon 3C of the Code of Judicial Conduct was adopted by the Judicial Conference of the United States in April, 1973.

prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. §455 (1976). Congress provided that section 455 as amended "shall not apply to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act." Act of Dec. 5, 1974, Pub. L. No. 93-512, §3, 88 Stat. 1609. One of the issues raised on appeal is whether Judge Stafford erred in applying amended 28 U.S.C. §455 to the *Potashnick* action, which had been filed prior to the effective date of the statute.[3]

In his opinion Judge Stafford noted the lack of uniformity among the reported decisions addressing the applicability of the 1974 amendment of section 455. *See, e.g., National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 958 n. 9 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 844, 59 L.Ed.2d 38 (1979); *United States v. Haldeman*, 181 U.S. App. D.C. 254, 353 n. 284, 559 F.2d 31, 130 n. 284 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *In re Continental Vending Machine Corp.*, 543 F.2d 986, 995 n. 4 (2d Cir. 1976); *Bradley v. Milliken*, 426 F.Supp. 929, 932 (E.D. Mich. 1977); *Samuel v. University of Pittsburgh*, 395 F.Supp. 1275, 1277 (W.D. Pa. 1975), *vacated on other grounds*, 538 F.2d 991 (3d Cir. 1976). Neither the language of the statute nor the cases discussing it clearly indicate whether the amendments were intended to apply to actions filed but not actually brought to trial prior to December 5, 1974, or only to cases instituted after that

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3 The effective date of amended 28 U.S.C. §455 is December 5, 1974. The initial pleading in this case was filed October 5, 1973. Trial of the action commenced August 4, 1975.

date. This inquiry is further confused by the fact that the statute does not apply to the "trial of any proceeding" commenced prior to the effective date, while the statutory definition of "proceeding" includes "pretrial, trial, appellate review, or other stages of litigation." 28 U.S.C. §455(d)(1) (1976).

Notwithstanding substantial authority to the contrary, we are compelled to hold that the amended version of 28 U.S.C. §455 is applicable to a case filed prior to the December 5, 1974 effective date of the amendment, when the trial of the case does not commence until after the effective date. This holding is mandated by our decisions in *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976) and *Parrish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975) *(en banc), cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). *See Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d 251 (5th Cir. 1978), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978). In *Davis*, amended section 455 was applied to an action which was filed but not tried prior to the December 5, 1974 effective date of the amendment. In *Davis* we did not discuss or cite section 3 of the Act (the effective date section) but merely stated that "[t]he recent amendment of 28 U.S.C.A. §455 . . . also must be considered." 517 F.2d at 1051.[4] In

4 The subsequent *Parrish* decision suggests that the court was confused about its application of section 455 in *Davis*. The *Parrish* opinion states that "[w]e held in *Davis v. Board of School Commissioners of Mobile County, supra*, that the amended statute applied where that appeal had not been fully submitted on the effective date of the

Parrish, as in *Davis*, the court was reviewing the question of disqualification of a trial court judge. The court held that it would apply the standards of amended section 455 in its appellate review if the appeal was not fully submitted prior to December 5, 1974, regardless of when the case was filed or trial commenced in the trial court. 524 F.2d at 102.[5] Bound by these precedents, we review the disqualification issue before us under the amended standards of 28 U.S.C. §455.[6]

Act." 524 F.2d at 102. In fact, the significant date in *Davis* under section 3 of the Act was the date trial commenced (and not the date of submission of the appeal) since the standards for disqualification were being applied to a trial court judge.

5 Judge Roney, in his special concurrence in *Parrish*, highlights the confusion surrounding the application of amended section 455.

> I agree that *en banc* consideration makes this an appellate review not "fully submitted,' so that §455, as amended, would apply *to* this appellate review, which means it would set the standard for recusal of any of our reviewing judges who might be challenged for bias. But that is not the question. The district judge sat at trial. What act applied *to* the trial? Congress clearly provided that the new §455 Act "shall not apply to the trial of any proceeding" commenced prior to December 5, 1974. The trial of this proceeding was completed prior to that date. We are judging the correctness of that trial and should do so by the standard applying to it as clearly set forth in the statute.

524 F.2d at 105.

6 The legislative history of amended 28 U.S.C. §455 does provide some support for applying the statute in this case. The sectional analysis set forth in the House Report states that "Section 2 [sic] makes the bill inapplicable to trials commenced and to appellate matters which were fully submitted prior to the effective date of the Act." 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6362. The negative implication of this sectional analysis is that the statute applies to trials commenced subsequent to the effective date, regardless of when the proceeding was instituted. Under this interpretation amended 28 U.S.C. §455 would clearly apply to the instant case, the trial of which commenced in August, 1975.

B. The Grounds for Disqualification

1. The Brock-Hand Connection

The various relationships between Judge Hand, Paul Brock, and the Hand, Arendall firm give rise to several potential grounds for disqualification of the judge under 28 U.S.C. §455.[7] Port City first claims that during the pendency of the case Judge Hand was so closely connected with Paul Brock, attorney for Potashnick, that his impartiality might reasonably be questioned. This argument for disqualification under 28 U.S.C. §455(a) is based on affidavits and exhibits which detail the business dealings of Judge Hand and Paul Brock. Port City also alleges that while the instant action was pending Brock represented Judge Hand in several unrelated matters. The district court found no reasonable basis for disqualification on these grounds, Judge Stafford noting that "it is indeed difficult to imagine that Judge Hand would be impartial [sic] because of any interest he shares with Brock or others in investments unconnected with this litigation." Amended Opinion and Order on Limited Remand, Record, vol. 7, at 1585. We disagree with this conclusion of the district court. Based on our interpretation of the language, history, and underlying policy of 28 U.S.C. §455, the relationship between the judge and Paul Brock presented a situation in which the judge's impartiality might well be questioned.

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7 All subsequent references to 28 U.S.C. §455 are to the amended version of the statute.

Section 455(a) provides that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." This language sets up an objective standard, rather than the subjective standard set forth in the prior statute through use of the phrase "in his opinion." According to the report of the House Judiciary Committee, the general standard of section 455(a) was designed to promote the public's confidence in the impartiality and integrity of the judicial process by saying, in effect, that if any reasonable factual basis for doubting the judge's impartiality exists, the judge "shall" disqualify himself and let another judge preside. 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6354-55.

Clearly, the goal of the judicial disqualification statute is to foster the *appearance* of impartiality. *Cf.* E. Thode, *Reporter's Notes to Code of Judicial Conduct* 60-61 (1973). This overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, "the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974).[8] Any question of

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8 Judge Hand shares our concern with appearances. Instructing the jury in *Potashnick* to avoid conversations with people in and around the court building, he noted that "[a]n appearance of evil is often worse than the evil itself, and others get the notion that we do not administer justice in our court system." Record, vol. 13, at 626-27.

a judge's impartiality threatens the purity of the judicial process and its institutions.

Because 28 U.S.C. §455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv.L.Rev. 736, 745 (1973). We believe that a reasonable person with knowledge of the business investments of Judge Hand and Paul Brock and the legal representation of the judge by Brock might very well question the judge's impartiality in a trial involving Paul Brock as chief counsel for a litigant.

The Brock-Hand relationship presents a situation rarely dealt with by courts involved in disqualification issues. A similar problem did arise in *Smith v. Sikorsky Aircraft*, 420 F.Supp. 661 (C.D. Cal. 1976). The judge in that case was disqualified despite the absence of any personal bias or prejudice because the plaintiff's law firm was associated with an attorney who had in the past acted as attorney and counsel for the judge. The relationship at issue in *Potashnick* raises more questions than that in *Smith;* here the judge was not only being

represented, albeit nominally, by Brock during the *Potashnick* litigation, but he had business dealings with him as well.

Counsel for Potashnick urges that Judge Stafford's opinion should not be interpreted as finding an attorney-client relationship between Judge Hand and Paul Brock at any material time. Whether a formal attorney-client relationship existed is not integral to our decision. The release prepared by Brock in the *Blackman* matter, which included Judge Hand, the offer of representation by Brock on the very day judgment was entered in *Potashnick*, along with the business relationship, are sufficient to raise a reasonable question of impartiality.

In deciding that Judge Hand should have disqualified himself under 28 U.S.C. §455(a) on the grounds discussed above, we note that "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6355. The amendment of 28 U.S.C. §455 did not alter the standard of appellate review on disqualification issues; however, the new statute requires a judge to exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case. Under the prior version of section 455, a judge faced with a close question on disqualification was urged to resolve the issue in favor of a "duty to

sit." *See Edwards v. United States*, 334 F.2d 360, 362 n. 2 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000, 85 S.Ct. 721, 13 L.Ed.2d 702 (1965). The language of the new statute eliminates the so-called "duty to sit." The use of "*might* reasonably be questioned" in section 455(a) (emphasis added) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case. In reviewing the exercise of judicial discretion in this case, we cannot ignore that the disqualification of a judge in any given case does not cause the delay or inconvenience which resulted in prior times. The growing number of federal judges, and the availability of rapid transportation to move those judges from place to place when necessary, make the decision to disqualify much less burdensome on the judicial system than in times past; any inconvenience which does arise is more than outweighed by the need to protect the dignity and integrity of the judicial process. Our desire to maintain an untarnished judiciary compels us to hold that Judge Hand was required by 28 U.S.C. §455(a) to disqualify himself from the *Potashnick* case, and his failure to do so constituted an abuse of sound judicial discretion.

Although the mandate of section 455 compels us to disqualify Judge Hand in this case, we respect his willingness to participate in a proceeding from which any other judge would have recused himself with relief, if not delight. The record reveals the personal hardship imposed on the judge by the length and complexity of the case and the number of parties and wit-

nesses involved. Judge Hand nevertheless tried the case fairly and efficiently, and, to his credit, none of the parties allege any bias or prejudice in his handling of the matter. The parties consistently refused the judge's repeated offers to disqualify himself, evidencing their confidence in his ability to dispense justice even-handedly.

Judge Hand's failure to disqualify himself in this case resulted from his natural reluctance to impose a trial such as *Potashnick* on one of his brethren. We note that there are only two judges on the bench in the Southern District of Alabama; if one of the two recuses himself from a case, the burden falls on the docket of his colleague. Judge Hand's determination to carry his share of the caseload is to be admired notwithstanding its unfortunate result in this case.

2. The Judge's Father

Port City claims that Judge Hand was disqualified to act in the *Potashnick* case because his father, Charles C. Hand, is Paul Brock's law partner. This assertion is based upon section 455(b)(5)(ii) and (iii), which provide that a judge should disqualify himself when

> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

The district court reviewing the motion to disqualify determined that the judge's father was not acting as a lawyer in the case because he did not actually participate in it. The court then considered the partnership arrangement between Charles Hand and Hand, Arendall as well as the fee arrangements between Potashnick and Hand, Arendall, and concluded that Charles Hand did not have an interest known to Judge Hand which could have been substantially affected by the outcome of the case. We agree that Charles C. Hand was not "acting as a lawyer" in the *Potashnick* case so as to disqualify the judge under section 455(b)(5)(ii). That provision requires actual participation. *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978); *see SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977); Code of Judicial Conduct, Commentary to Canon 3C(1)(d)(ii). We disagree, however, with the lower court's conclusion under section 455(b)(5)(iii). We hold that when a partner in a law firm is related to a judge within the third degree, that partner will always be "known by the judge to have an interest that could be substantially affected by the outcome" of a proceeding involving the partner's law firm.

United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978) supports this decision. In that case, the district court judge's son was an associate of the law firm representing Equifax. The judge's son did not actively participate in Equifax's defense so as to be acting as a lawyer under section 455(b)(5)(ii). In deciding against disqualification of the judge, the court noted that "[t]he 'financial interest' provision [section 455(b)(5)(iii)] might apply if the district judge's son were a partner in the firm. But his status as an associate removes that fear. . . . His salary interest as an associate is too remote to fall under this 'financial interest' prohibition." 557 F.2d at 463.

As the court's dicta in *Weinberger* suggests, a partner's interest in the outcome of any matter handled by his law firm is substantially greater than that of an associate or an employee. The partner's greater interest stems from the nature of the partnership relationship and its concomitant rights, duties, and liabilities. *See, e.g.*, Uniform Partnership Act §§6, 9, 11-15. The outcome of any proceeding handled by a law firm may affect the partners' financial interests as well as certain noneconomic interests, including the reputation and goodwill of the firm.

The language of section 455(b)(5)(iii) referring to "an interest" does not require that the interest of the judge's lawyer-relative be financial. *See SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977). Other pro-

visions of section 455 make specific reference to financial interests; section 455(b)(4) includes references to both financial interests and "any other interest." Although the reporter's notes to Canon 3C of the Code of Judicial Conduct[9] suggest that only economic interests specifically require disqualification, the congressional drafters recognized that noneconomic interests may affect a judge's bias or prejudice. *See* E. Thode, *Reporter's Notes to Code of Judicial Conduct* 63, 66 (1973); Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 51-52, 106-108 (July, 1971-May, 1973).

Turning to the interest of Judge Hand's father in the outcome of the proceeding, the district court opinion states that during the time *Potashnick* was pending, Charles Hand received a one percent share of Hand, Arendall's income. The fee received by the firm in this case was based on a fixed hourly rate, and the fee was not affected by the outcome of the case. While Charles Hand's financial interest was not actually affected by the outcome of the case, we interpret section 455(b)(5)(iii) to require disqualification when the lawyer-relative's interest has the potential to be affected by the outcome. This case would have been handled on a contingent fee basis, or a favorably result might have justified a higher fee, so that Charles Hand's interest could have been affected by the outcome.

9 Canon 3C of the Code of Judicial Conduct is substantially identical to 28 U.S.C. §455 (1976).

Apart from the potential financial interests at stake, a win or loss in any lawsuit could affect a partner's interest in his firm's reputation, its relationship with its clients, and its ability to attract new clients. The language of section 455(b)(5)(iii) does not require the judge to investigate whether his lawyer-relative's interest will in fact be affected by the outcome of the proceeding. Instead, the statute requires automatic disqualification when the judge in a proceeding knows of his relative's interest, and the outcome of the proceeding may potentially affect that interest.

Underlying our decision to disqualify Judge Hand is the assumption that a partner will always have some interest which could be affected by the outcome of a proceeding handled by his law firm. However, a recent advisory opinion interpreting Canon 3C of the Code of Judicial Conduct suggests that apart from any interests involved, the partner status of the judge's relative by itself is sufficient ground for disqualification. Titled "Disqualification in a case in which a relative is employed by a participating law firm," the opinion notes the distinction between law firm associates and partners, and states:

> We believe the following conclusions find support in the Code [of Judicial Conduct]. A judge is disqualified and should recuse if a relative within the third degree of relationship to the judge or his spouse (a) is a partner in a law firm appearing in the case; *or* (b) will profit or lose

> from the judge's action in the case either financially or otherwise, for example, the reputation of the firm would be significantly affected by the litigation.

Advisory Committee on Judicial Activities, Advisory Opinion No. 58 (1978) (emphasis added). The use of "or" in the quoted language above indicates that either an interest or partner status of the relative will require disqualification. The advisory opinion, in conformity with our holding in this case, advocates automatic disqualification of a judge based on his relation to a law firm partner. While this result may seem harsh and inconvenient, we believe it will serve to promote public confidence in the integrity and impartiality of the judiciary in general and of the participating judge in particular.

C. Waiver

In certain situations, disqualification can be waived. When the basis for disqualification is that the judge's "impartiality might reasonably be questioned," section 455(e) permits waiver after a full disclosure on the record of the grounds for disqualification. The judge may then continue to participate in the case. The state prohibits the judge from accepting a waiver of his disqualification if it is based on the specific grounds set forth in section 455(b). For example, a small financial interest or a kinship within the third degree cannot be waived under the statute. At the time section 455 was

enacted, the Code of Judicial Conduct permitted waiver in the aforementioned two circumstances, but Congress believed that public confidence in the impartiality of federal judges would be enhanced by a stricter treatment of waiver. 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6357. *See also* Frank, *Commentary on Disqualification of Judges — Canon 3C*, 1972 Utah L.Rev. 377.

This court has decided that Judge Hand was disqualified from participating in the *Potashnick* proceeding on two separate grounds. The judge's business dealings with Paul Brock constituted a ground for disqualification under section 455(a). Had the judge fully disclosed his relationship with Brock on the record, the parties could have waived this ground. During a pretrial conference with the attorneys Judge Hand stated that he was aware that remarks had been made suggesting that he would not be impartial due to his prior association as a partner in the Hand, Arendall law firm. The judge indicated he would favorably consider a motion to recuse himself made by any party. All of the attorneys involved asked Judge Hand not to recuse himself, since recusal would greatly delay trial of the case, all the lawyers knew of the prior association, and the case had been on Judge Hand's docket since October 1973, and if any attorney had a question about the judge's impartiality a motion should have been filed previously. Under the express language of section 455(e), the pretrial conference proceedings cannot constitute a valid waiver. The judge's disclosure of his prior

relationship with Hand, Arendall did not reveal the nature of his relationship to Paul Brock. The affidavits submitted as part of the motion to disqualify indicate that Port City's attorney did not discover the Brock-Hand connection until the trial was concluded, so that any waiver of disqualification would not apply to that ground.

Port City's motion to disqualify indicates that at the time of the assignment of the *Potashnick* action to Judge Hand's docket every attorney involved in the action, as well as the attorney in the transferred exoneration action, knew Judge Hand's father was the senior partner of Hand, Arendall. Notwithstanding their knowledge of Judge Hand's associations with Hand, Arendall, the attorneys involved not only did not file any motion asking the judge to disqualify himself from trying the cases, but in fact did not suggest disqualification when the judge more than once indicated he would accede to such suggestion.

The express language of section 455(e) dictates that a judge cannot accept a waiver of disqualification on section 455(b)(5)(iii) grounds, such as when a relative of the judge has an interest which could be affected by the outcome of the proceeding. Although section 455 places the obligation to disqualify with the judge, a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy. The statute imposes, however, no duty on the parties to seek disqualification, nor any time limits within which dis-

qualification must be sought. Although the Department of Justice recommended that section 455 include some limitation of time "to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before," Congress did not incorporate this recommendation. 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6358; *see SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977).

We need not decide, however, whether a reversal on this ground alone would be foreclosed by Port City's failure to raise the issue of disqualification, or even make an issue when invited to do so by the judge, until judgment was entered against it. The prior ground for reversal is sufficient to mandate a new trial. The unfairness and expense which results from disqualification in a case like this case can be avoided in the future only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned.[10]

III. Severance of the Consolidated Action

Having determined that Judge Hand was disqualified from participating in the *Potashnick* action, we must decide whether our decision to reverse extends to the judgment entered in the exoneration action consolidated with *Potashnick* for trial.

10 Recognizing the considerable confusion surrounding the law of disqualification in the past, we emphasize the clear path of the future.

As the facts indicate, U.S.F. & G. filed a petition for exoneration to ascertain its obligations under surety bonds covering agreements between Potashnick and Port City. U.S.F. & G. settled all but one of the labor and material claims asserted in the exoneration action. The remaining crossclaim and counterclaim of W. D. Brunson was transferred to Judge Hand's docket for further proceedings in consolidation with the *Potashnick* action. At the conclusion of trial, judgment was entered in favor of Brunson and against Port City and U.S.F. & G. Record, vol. 4, at 751.

Brunson argues on appeal that if Judge Hand is disqualified and the case reversed, this should not affect the judgment in his favor. Brunson's arguments are compelling. The exoneration lawsuit involves only U.S.F. & G., Port City and Brunson; Potashnick and his surety Continental are not parties to that action. Since the judge's disqualification stems from his relationship to Potashnick's counsel, the resulting reversal, Brunson asserts, should apply only to the action in which Potashnick is a participant. We agree with this assertion.

According to the trial court's findings of fact, Brunson's claim against Port City and U.S.F. & G arose out of the construction of a clay blanket for the aerated lagoon project at issue in the main action. Brunson had initially subcontracted with Port City to perform all the work on the clay blanket item. After the initial construction method proved unsuccessful, however, Port City took over the spreading of the clay blanket, and

Brunson merely delivered material to the jobsite. Port City's inefficient construction of the clay blanket resulted in an overrun of the material used, and Brunson sought recovery for the excess material he had provided. The trial court concluded that Brunson was entitled to recover from Port City for the balance due on the contract plus the additional amounts owed for the material overrun and for loading and hauling topsoil to the project. Port City was entitled to setoff against Brunson's recovery for the work done by Port City in spreading the clay blanket. Record, vol. 4, at 726-27, 748. Port City does not appeal from the judgment for Brunson entered against it. The amount of money Port City owes to Brunson is undisputed; rather, Port City contends that it is entitled to recover that amount from Potashnick, the prime contractor on the project. Because we are reversing the judgment in the main action tried by Judge Hand, we need not consider this issue which is raised in Port City's appeal from the judgment for Potashnick.

U.S.F. & G. was found liable to Brunson in the exoneration suit under the labor and material bonds on the prime contract between Potashnick and Port City, the parties to the main action. These bonds provided that U.S.F. & G. would pay for labor and materials incurred by Port City in the performance of its contract with Potashnick. U.S.F. & G. argues on appeal that the trial court erred in failing to discharge U.S.F. & G. from all liability on the bonds issued to Port City since the evidence shows Port City materially altered and departed from the terms of the original contracts, de-

sign, drawings, and specifications. Brunson contends that there were no material alterations in the plans and specifications relating to the clay blanket sufficient to discharge the surety.

The trial court made extensive findings of fact on the clay blanket issue and found that the method ultimately used for construction of the clay blanket was within the terms of the plans and specifications. Record, vol. 4, at 722. The court also found that there had been no material alterations of the contracts between Port City and Potashnick. Record, vol. 4, at 699. Our review of the record satisfies us that the trial court's findings of fact on the clay blanket and U.S.F. & G.'s bond liability are not clearly erroneous and should not be set aside. Fed.R.Civ.P. 52(a). We therefore affirm the trial court's judgment in favor of Brunson against Port City and U.S.F. & G.

Our affirmance of Brunson's judgment eliminates Brunson from retrial of an action in which he is only tangentially involved. The exoneration action was consolidated with *Potashnick* because Brunson's claim against U.S.F. & G. centered on the clay blanket operation, also an integral part of the main lawsuit. Unfortunately, the main lawsuit involved numerous other issues, and the consolidation changed Brunson's action from a one or two day proceeding to one lasting thirty-three days. Our reversal of the judgments in the main action stems from certain relationships between Judge Hand and the attorney for a party not involved in Brunson's lawsuit. We do not think Brunson should be forced to participate in a retrial of the main action be-

cause the judge was disqualified in the prior action with which his suit was consolidated.

We recognize that in affirming Brunson's judgment, we decide the question of U.S.F. & G.'s bond liability for the clay blanket construction, which is also an issue in the main action to be retried. Absent exceptional circumstances, our decision on this specific issue becomes the law of the case in any subsequent retrial. *See Schwartz v. NMS Industries, Inc.*, 575 F.2d 553, 554-55 (5th Cir. 1978); *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). We do not, however, think our partial affirmance on this one narrow issue will bear significantly on the retrial of the numerous other claims in this case.

IV. The Right to Retain Hired Counsel in a Civil Case

On the fourth day of the trial of this action, during a break in the first witness' testimony, Judge Hand announced:

> During recess and breaks, while a witness such as Mr. Jenkins is on the stand, I do not think it appropriate for counsel to have further discussions with the witness until he has completed his testimony. And, I want to make sure that everybody understands that as part of the Court's instructions. Once he has commenced his testimony, I think it is highly improper for counsel to have any further con-

versations with that witness until he has completed his testimony.

Record, vol. 13, at 652-53.

During the course of trial, counsel for defendant Port City violated the judge's rule by conferring with B. G. Quinnelly, sole stockholder and president of Port City, during a recess in Quinnelly's testimony. Port City's counsel had not understood the rule to prohibit an attorney from conferring with his own client during breaks and recesses in the client's testimony. As a result of Port City's misunderstanding and subsequent violation of the rule, it was forced to choose among 1) having a mistrial declared, 2) excluding any further testimony by B. G. Quinnelly, or 3) proceeding without a jury. Port City chose to proceed without a jury, and now argues that Judge Hand's rule violated Port City's constitutional right to retain hired counsel and resulted in the loss of its right to trial by jury.

There is a paucity of authority dealing with the existence of a right to counsel in civil cases.[11] This lack of precedent is due in part to the historical development of the right to counsel in criminal cases. Prior to 1836, the

11 The brief of R. B. Potashnick and Continental Casualty Company as appellees cites *Barker v. Hardway*, 283 F.Supp. 228, 237 (S.D. W.Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905, 89 S.Ct. 1009, 22 L.Ed.2d 217 (1969) and *Suess v. Pugh*, 245 F.Supp. 661, 665 (N.D. W.Va. 1965) for the proposition that there is no constitutional right of counsel in civil cases. Neither of the cited cases involve a courtroom judicial proceeding. In *Barker* the right to counsel was denied to students at a school disciplinary hearing; in *Suess* the right was denied to a Veteran's Administration physician appearing before a Professional Standards Board.

English system recognized the right of accused criminals to be represented by counsel in the trial of less serious crimes, while denying representation to alleged felons. *See Powell v. Alabama*, 287 U.S. 45, 60, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Beaney, *The Right to Counsel in American Courts*, 8-9 (1955).

> In view of the anomalous procedures in British criminal courts, it is not surprising that the framers of the American Constitution specifically provided for a right to retain counsel in criminal prosecutions. Because English practice had recognized the right to retain civil counsel, there was no need to reaffirm the prerogative. Therefore, the sixth amendment's rejection of the English criminal practice does not represent the denial of a right to retain counsel in civil litigation. The existence of such a right has, indeed, been generally assumed in the American legal system.

Note, The Right to Counsel in Civil Litigation, 66 Colum.L.Rev. 1322, 1327 (1966).

Although there do not appear to be any civil cases on this point, the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925). The right develops out of the principle that notice and hear-

ing are preliminary steps essential to the passing of an enforceable judgment and that they constitute basic elements of the constitutional requirement of due process of law. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Historically and in practice, the right to a hearing has always included the right to the aid of counsel when desired and provided by the party asserting the right. *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." 287 U.S. at 69, 53 S.Ct. at 64 (emphasis added); *accord, Roberts v. Anderson*, 66 F.2d 874 (10th Cir. 1933); *Rex Investigative and Patrol Agency, Inc. v. Collura*, 329 F.Supp. 696, 699 (E.D. N.Y. 1971).

Recognizing that a civil litigant has a constitutional right to retain hired counsel, we hold that Judge Hand's rule prohibiting a litigant from consulting with his attorney during breaks and recesses in the litigant's testimony impinges upon that right. We draw our support from *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). In *Geders* a trial court order prevented the defendant in a federal criminal prosecution from consulting his attorney "about anything" during a seventeen hour overnight recess in the trial

between his direct and cross-examination. The Supreme Court held that the trial court order impinged upon defendant's sixth amendment right to the assistance of counsel. 425 U.S. at 91, 96 S.Ct. 1330.

We note at the outset that certain distinctions can be made between the rights of civil litigants and those of criminal defendants. A criminal defendant's right to counsel arises out of the sixth amendment, and includes the right to appointed counsel when necessary. *See, e.g., Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55 (1932). A civil litigant's right to retain counsel is rooted in fifth amendment notions of due process; the right does not require the government to provide lawyers for litigants in civil matters. *Hullom v. Burrows,* 266 F.2d 547 (6th Cir.), *cert. denied,* 361 U.S. 919, 80 S.Ct. 262, 4 L.Ed.2d 187 (1959); *McGaughy v. Gardner,* 296 F.Supp. 33, 36 (E.D. La. 1967). A criminal defendant faced with a potential loss of his personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages, and for this reason the law affords greater protection to the criminal defendant's rights.

Notwithstanding the civil-criminal dichotomy, an analogy can be drawn between the criminal and civil litigants' respective rights to counsel. In both cases the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the

guiding hand of counsel at every step in the proceedings against him. *See Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932). In each instance, the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement. The *Geders* decision emphasizes the importance of permitting communication between attorney and client during trial recesses.

> It is common practice during such [overnight] recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

425 U.S. at 88, 96 S.Ct. at 1335. The need for attorney-client communication is certainly no less in a civil case.

In *Geders*, as in the instant case, the trial court's controverted order was imposed to avoid possible "coach-

ing" of witnesses. The *Geders* court noted several alternative ways to avoid improper influences on testimony but concluded that "[t]o the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without intervention of counsel, with the risk of improper 'coaching,' the conflict must . . . be resolved in favor of the right to the assistance and guidance of counsel." *Id.* at 91, 96 S.Ct. at 1337. The court in *Geders* specifically limited its decision to the particular circumstances before it — an order preventing attorney-client consultation "about anything" during a 17-hour overnight recess. 425 U.S. at 91, 96 S.Ct. 1330. Judge Hand's rule in the instant case similarly prohibited "any further conversations" with a witness once his testimony commenced, and the application of the rule barred the president and sole shareholder of the defendant Port City from talking to his attorney for a period of seven days, including several overnight recesses. Judge Hand's denial of any attorney-client communication for such an extended period of time resulted in a significant deprivation of the effective assistance of counsel and thus impinged upon Port City's constitutional right to retain counsel.

Counsel for Potashnick argues that Judge Hand's rule did not deny any party its right to counsel because defendant Port City is a corporation, and the judge's rule applied only to bar communication between counsel and the corporation's president testifying as a *non-*

party witness. We recognize that Port City Construction Company is the named defendant in this case. However, we find that B. G. Quinnelly's position as president and sole shareholder of Port City required him to act for the corporation in the attorney-client relationship so as to afford him client status. *See Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968); *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa. 1962).[12]

We hold that the judge's rule pertaining to attorney-client communication impinged on Port City's due process right to retain counsel. This violation of a constitutional right constitutes a ground for reversal of the judgment in this case. Because Port City waived its right to jury trial only to avoid the harsher alterna-

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12 *Natta* and *Westinghouse* deal with the question of whether a corporate agent's communications qualify as the corporate client's communications to enable the corporation to invoke the attorney-client privilege. The test of client status formulated by the courts is membership in the "control group" authorized to make decisions for the corporation with respect to the legal matter about which the attorney is consulted. In other words, the test as to which corporate officers and employees are in a position to speak for the company within the meaning of the word "client" is whether the person has the authority to control, or substantially participate in, a decision regarding to be taken on the advice of a lawyer, or is an authorized member of a group that has such power. *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968). Although the attorney-client privilege is not at issue in the instant case, we find the test for "client" status set forth in *Natta* to be applicable here as an aid in determining whether B. G. Quinnelly should be viewed as a party constitutionally entitled to retain counsel. Since Port City is a corporation which can act only through its officers and agents, and because Quinnelly represents the corporation and acts as "client" in the attorney-client relationship, we think the corporate party's right to counsel must be extended to B. G. Quinnelly.

tives (mistrial or exclusion of Quinnelly's testimony) resulting from its violation of the judge's rule, Port City should not be held to its waiver in any subsequent retrial.

Because we are reversing the judgment in this case on a second ground unrelated to the disqualification issue, we must again determine whether this reversal extends to the judgment entered in the exoneration action consolidated with *Potashnick* for trial. We find that it does not.

Both Port City and B. G. Quinnelly were named defendants in the amended bill of exoneration filed by U.S.F. & G. By the time the action was consolidated with *Potashnick,* however, judgments had already been entered in favor of U.S.F. & G. against Port City and B. G. Quinnelly. The only controversy remaining in the action involved W. D. Brunson's cross-claim against Port City and its counterclaim against U.S.F. & G. After trial on the main and consolidated actions, judgment was entered in favor of Brunson against Port City. Port City does not appeal from this judgment; rather, Port City contends that it is entitled to recover from Potashnick the amount it admittedly owes Brunson.[13] Because Port City, the party claiming a violation of its constitutional right to counsel, does

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13 The absence of any controversy between W. D. Brunson and Port City is evidenced byB. G. Quinnelly's testimony at trial that "I don't have any argument with Mr. Brunson. He is noted to be the best dirt hauler in the City and that is the reason I chose him." Record, vol. 21, at 4861.

not take issue with the judgment against it in Brunson's favor, we again affirm the judgment in the consolidated action.

V. Issues Not Decided

The parties to this appeal raise several other issues going to the merits of the case. They dispute, *inter alia:*

1) whether Potashnick made an implied warranty of sufficiency of the plans and specifications to Port City and whether such warranty was breached;

2) whether there were material alterations of and departures from the bonded contracts sufficient to discharge the surety U.S.F. & G. from liability on its bonds;

3) the interpretation of the October 25, 1972 letter agreement between Potashnick and Port City and the exclusion of evidence concerning the agreement;

4) the award to Potashnick of recovery over against the City for extra work performed by Port City;

5) the award to Potashnick of prejudgment interest on the amounts owed by the City for retainages withheld and the unpaid balance on the contract;

6) the denial to the City of recovery against Potashnick for attorney's fees and expenses; and

7) whether there was a conflict in substantial evidence to create a jury question if the case had been tried to conclusion before the jury.

Because this case must be retried before a different judge, and because it may be retried before a jury, it would serve no purpose for us to decide these issues on this appeal.

VI. Conclusion

Unable to bring this lengthy litigation to an end, we reluctantly reverse the judgment in *Potashnick v. Port City Construction Co.* and order the case to be retried before a new judge and jury. We affirm the judgment in the consolidated action of *United States Fidelity and Guaranty Co. v. Brunson.*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

R. B. POTASHNICK,
Plaintiff,

versus CA No. 7867-73-H

PORT CITY CONSTRUCTION COMPANY, et al.,
Defendants.

(CONSOLIDATED FOR TRIAL)

UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Plaintiff,

versus CA No. 7935-73-P

PORT CITY CONSTRUCTION COMPANY, INC.,
a corporation, et al.,
Defendants.

FINDINGS OF FACT

I. *The Pleadings*

1. This litigation arises out of the construction of the North Mobile Industrial Area Waste Treatment Facilities, Aerated Lagoon, Project No. 531A. R. B.

Potashnick ("Potashnick") the general contractor filed his complaint against Port City Construction Company ("Port City"), a subcontractor on the job which performed much of the dirt work, and United States Fidelity and Guaranty Company ("USF&G"), Port City's bonding company. The complaint seeks recovery for the overrun incurred by Potashnick in completing Port City's work after Port City left the project and damages resulting from delay of the project caused by Port City's unsatisfactory performance, including a claim for recovery over of liquidated damages claimed against Potashnick by the City of Mobile ("The City"), the owner of the project. The complaint was initially in the amount of $500,000.00 but was subsequently amended to reduce the ad damnum clause to $200,-000.00.

2. Port City and USF&G answered the complaint, and Port City filed a counterclaim seeking damages on various legal theories in the total amount of $2,317,168.94 against Potashnick and his bonding company, Continental Casualty Company ("Continental"). The counterclaim consists of six separate counterclaims, each of which claims substantially the same damages, although there is some variation. The theories upon which Port City relies for relief are as follows: (1) breach of implied warranty, (2) misrepresentation, (3) breach of contract by failure to pay on time, (4) extra work over and above contractual obligations, (5) anticipatory breach of contract, and (6) extra work plus a modification of the contract.

3. Potashnick and Continental answered the counterclaim denying liability and in addition filed a third-party complaint against the City and J. B. Converse and Co., Inc. ("Converse"), the engineer which designed the project and supervised its construction. Recovery was sought against Converse and the City on the theories of breach of implied warranty, negligence in design, negligence in supervision, and misrepresentation. In addition, recovery was sought against the City alone on the theory of extra work over and above contractual obligation. A separate claim was made by Potashnick only for recovery of $300,397.65 plus interest due for the withheld retainage and payment due on the contract. Except for the cause of action for retainage and payment due on the contract, Potashnick and Continental prefaced each of their claims against the City and Converse with the caveat that they strongly denied any and all claims by Port City and that the third-party complaints were asserted only on the alternative possibility that the Court should find in favor of Port City on its claim against Potashnick and Continental.

4. The City, in addition to answering the third-party complaint of Potashnick and Continental, filed a counterclaim against Potashnick and Continental seeking to recover liquidated damages in the amount of $85,300.00 and, in addition, seeking indemnity from Potashnick for any and all damages which might be awarded in favor of Potashnick and Continental against the City. The City also filed a cross-claim

against Converse seeking indemnity from it based upon theories of negligence, breach of warranty, and misrepresentation. In its cross-claim the City also emphatically denied that Converse had been guilty of negligence, breach of warranty, or misrepresentation, but asserted its claim for indemnity solely upon the basis that it was entitled to indemnity should the Court find any merit to the allegations of Port City.

5. The above claims were all asserted in the case of *Potashnick v. Port City Construction Company, Inc., et al.*, Civil Action No. 7867-73-H. Consolidated with it for trial was the case of *United States Fidelity and Guaranty Company v. Port City Construction Company, et al.*, Civil Action No. 7935-73-P. That case was initially filed as an action by USF&G seeking exoneration from liability on the labor and material bonds which it had entered into as surety for Port City on its contracts with Potashnick. Prior to trial, all of the many claims which had been asserted in that litigation had been concluded except for the claim of W. D. Brunson ("Brunson"), a supplier and sub-subcontractor of Port City, who was seeking recovery for the work performed by him on the job, principally in connection with the construction of the clay blanket, for which he had not been paid. In addition, USF&G sought judgments on the master surety agreement against Port City and the indemnitors on said agreement, being Rebel Equipment Company, G & M Investment Company, G. B. Quinnelly, Yovonne Quinnelly, Harold Quinnelly and Sylvia Quinnelly ("the indemnitors").

6. Continental stated in the pre-trial order that it joined Potashnick in any and all pleadings, positions, objections, offers of evidence and other actions taken by Potashnick previously and in the future in this litigation unless specifically noted otherwise, and USF&G made an identical statement that joined likewise with Port City.

II. *General Background*

7. Potashnick is a citizen of the State of Missouri. Port City is a corporation incorporated under the laws of the State of Alabama, with its principal place of business at Prichard, Alabama. USF&G is a corporation organized and existing under the laws of the State of Maryland with its principal place of business in Baltimore, Maryland. Continental is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. Third-party defendant City of Mobile, Alabama is a municipal corporation incorporated under the laws of the State of Alabama. Converse is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Mobile, Alabama. W. D. Brunson, B. G. Quinnelly, Yovonne Quinnelly, Harold Quinnelly, and Sylvia Quinnelly are residents of the State of Alabama. Rebel Equipment Company and G & M Investment Company are dormant corporations, having their principal places of business in Mobile, Alabama.

8. The land on which the lagoon was constructed was initially owned by International Paper Company ("I.P."). I. P. was in need of additional waste treatment facilities in order to comply with certain anti-pollution requirements. In 1969 it had engaged Vester J. Thompson, Inc. ("Thompson") for preliminary work with regard to construction of an aerated lagoon in the general area where this project was finally constructed. Thompson at that time made certain subsurface investigations, including soil borings in the area, and submitted a preliminary report setting out in broad terms one possible concept which was strictly preliminary in nature without the preparation of any detailed drawings or specifications for such a project.

9. Subsequently, an agreement was entered into between the City and the Board of Water and Sewer Commissioners of the City of Mobile ("The Board") concerning the construction of the lagoon, and a separate service agreement was entered into between the Board and I. P. with regard to the payment of the cost of production and maintenance of the lagoon.

10. The City engaged the services of Converse to design the project and to serve as the City's representative during the construction of the project. Converse provided general supervision of the project in the form of on site observation and had a representative on the project. However, as stated in section 5.02 of the specifications, Converse was not charged with the responsibility of directing the actual procedures and

detail methods of construction used by the contractor in accomplishing the work contained in the contract. Converse prepared plans and specifications for the facility, which plans and specifications were disseminated to prospective bidders. Potashnick, as the low bidder, was awarded the contract to perform the work as the general contractor and entered into a contract for the construction of the facility for approximately $2,694,116.00 on October 26, 1971.

11. Potashnick subcontracted the vast majority of the work involved. The principal subcontractors involved were Trans State Dredging Company ("Trans State"), Matthews Electrical Service ("Matthews"), Ernest Construction Company ("Ernest"), and Port City. Trans State contracted with Potashnick to excavate the keyway and to dredge in the hydraulic fill from the river and in addition to excavate the new Alabama Power Company canal. Ernest subcontracted to do the pile driving work on the job and Matthews to do the electrical work. Port City entered into several agreements with Potashnick whereby essentially it was to perform the dirt work (except for Trans State's portion) and to construct the various structures on the project.

12. The lagoon is located on a site approximately 100 acres in size and the interior of the lagoon is approximately 70 acres. The project site is located in an area which can best be described as a swamp. The average ground elevation prior to construction was approx-

imately three feet above sea level and was subject to almost complete inundation at high tides.

13. The lagoon is trapezoidal in shape with the north and south levees being parallel. The south dike is approximately 2,600 feet in length, the north dike approximately 2,000 feet, and the east and west dikes approximately 1,500 feet each. On the eastern end is a separate enclosure called the emergency basin. It extends the full length of the eastern end, approximately 1,500 feet, and is 200 feet wide at the top.

14. The lagoon was constructed by excavating a keyway which was approximately 110 feet wide at the bottom to a depth of seven feet below sea level. Sand fill material was then hydraulically dredged into the keyway from the bottom of the Mobile River and sufficient material was placed to shape the dikes to a height of 19 feet above sea level. The finished top of the dike was approximately 12 feet wide. The sides were built on a 3-1 slope, thus causing the base to be approximately 108 feet across. All told, including the emergency basin, about 9,500 linear feet of dike were constructed, the cross-sectional size being somewhat greater than described above in the area of the emergency basin and at the locations of various control stations.

15. The City gave Potashnick official notice to proceed and stated that the one year period for the completion of the work under the contract was to be-

gin November 25, 1971. Port City had already commenced work prior to that date on clearing and grubbing of the access road and on construction of the access road.

16. Trans State, which had subcontracted to perform the excavation of the keyway and the dredging of the hydraulic fill (which work constituted over 40% of the total job), had sub-subcontracted the excavation portion of its work to E & I Construction Company ("E & I"). E & I arrived on the job in December of 1971 and commenced the relocation of the Alabama Power canal during December. In January it began work on excavation of the keyway for the lagoon dikes. E & I apparently did not perform its work satisfactorily and Trans State replaced it with Circle Incorporated ("Circle"), which completed the excavation of the keyway and did other work for Trans State during the project. Trans State commenced dredging in of hydraulic fill in the middle of March of 1972. The explosive test sections for the stabilization of the dike were commenced on or about May 10, 1972, and around the end of May or first of June, Potashnick and Port City verbally agreed to the terms which were subsequently incorporated into the August 1972 addendum to the January 1972 subcontract. In early June, the excavation of the keyway was completed and the explosive test sections were completed around the middle of June.

17. It was realized by the engineers that the test use of explosives was not accomplishing the desired

purpose of stabilizing the dike. The plans and specifications called for tests to be made after the use of explosives on the test sections of the dike in order to evaluate the results of the explosions, and the borings made by Thompson for Converse after the test sections were detonated revealed that the explosions were not causing the dike to settle further in any appreciable amount. The engineers concluded that the dredged-in material had settled during the dredging-in process as much as it probably ever would settle and thus explosives were not needed for that purpose. Converse determined, however, that some additional stabilization was needed in order to prevent base shear failures, and, accordingly, berms were added by change order.

18. Up until the time of the conclusion of the explosive test sections, the project had proceeded without any significant disagreement or problem. It was somewhat behind schedule during this period of time but not significantly as indicated by the fact that the dredging was subsequently completed on July 18th, which was only about ten days behind schedule. Grading and shaping of the dikes had been scheduled to be completed at approximately the same time and the clay blanket also scheduled to start prior to then, but obviously none of this work could have been commenced until the stabilization situation was resolved.

19. The approval for the initial berm construction was given informally by Converse and the City on

July 20, 1972, and work commenced thereon by Port City on July 21st. On August 11, 1972, the complete plans for the berm construction were released, and work should have proceeded to completion without any substantial difficulties or delay thereafter.

20. Subsequent to the construction of the berms, the excavated material, commonly referred to as muck, which had been deposited on either side of the key-way, was leveled to the extent necessary and a two foot clay blanket was applied on the interior of the lagoon from the top of the dike down the slope and 75 feet out into the main lagoon and over the entire inner surface in the emergency basin. Its purpose was to prevent or greatly reduce any seepage of the contents from the lagoon and the emergency basin. Asphalt slope protection (referred to in the plans and specifications as two inch bituminous slope protection) was placed on the inside slope of the dike for a width of approximately twelve feet to guard against erosion by the water, and a shell surfaced road was constructed on the top of the dike.

21. During the sequence of construction set out above, various structures for the entrance and outlet of the effluent into the lagoon and the emergency basin were also constructed as were control stations for the operation of the aerators and a loading dock to place them in the lagoon and to remove them. The placement of the mechanical aerators in the lagoon was the final major item of work.

22. The above described work constituted the principal items of work involved in the construction of the completed lagoon, although, of course, many other items, such as fencing, grassing, pile driving, clearing and grubbing, installing of electrical service, etc., were performed.

23. The problems which brought about this lawsuit began to occur in approximately August of 1972. It was at that time that Port City became heavily involved in the construction of the project as a whole and the progress of the job depended almost entirely upon the progress of Port City. Port City had agreed in its contracts "to prosecute the work diligently and continuously with sufficient equipment, materials and supplies, together with sufficient men so that the work hereunder can proceed as quickly and expeditiously as possible and so as not to delay contractor from completion of the prime contract within the time limits stated therein." This Port City totally failed to do in that it did not provide sufficient men and equipment or competent supervision of its work to complete the job on time and it certainly did not prosecute the work diligently. Numerous letters were written by Potashnick and Converse complaining of Port City's delay on the job with little or no apparent success. Due to Port City's poor performance, the job stumbled on until finally over the weekend of June 23rd and 24th, 1973, Port City quit and removed its men and equipment from the site.

24. Thereafter Potashnick mobilized the forces necessary to complete Port City's work and by August 28th and had completed the work to the extent that the lagoon and emergency basin were ready to accept influent. However, Potashnick could not float the aerators and perform that work which necessarily came after the floating of the aerators until the lagoon was full and this did not occur until approximately October 11th. This should have been completed some thirty days sooner but was delayed due to the fault of either the City or I. P., for whose fault the City is responsible to Potashnick. According to a letter from Converse to the City dated November 30, 1972, the project was completed on November 14, 1973. The Court, however, finds that the project was substantially completed so as to terminate any possible liability for liquidated damages on November 5, 1973, when the aerators were started.

25. Continental had executed a labor and material bond as surety for Potashnick in the amount of $1,347,058.00, the condition of which bond was that Potashnick would pay all subcontractors, laborers, materialmen, etc. for labor, materials, etc. provided on the job. In September of 1973, Port City gave Continental and Potashnick written notice of a claim by Port City against Potashnick in the amount of $1,633,375.65. Subsequently, in January of 1974, Port City gave Continental and Potashnick a further written notice of claim by it against Potashnick in the amount of $1,817,168.94.

III. *Port City's Subcontracts and Agreements*

26. The majority of Port City's work was provided for by two subcontracts, dated November 15, 1971, and January 28, 1972. For all practical purposes, these two subcontracts were identical except for the itemization of the work which was to be performed. The more pertinent portions of these subcontracts with respect to the issues in this lawsuit are as follows:

* * *

> WHEREAS, Contractor has been the successful bidder on a contract with the City of Mobile, Mobile, Alabama, hereinafter referred to as Owner, being designated as North Mobile Industrial Area Waste Treatment Facilities Aerated Lagoon, Project No. 531-A, Contract No. 1, consisting of the construction of the North Mobile Industrial Area Waste Treatment Facilities Aerated Lagoon, and is to perform the said job according to the plans, specifications and addendums and within the time specified in the contract, plans and specifications; and
>
> * * *
>
> 2. Subcontractor is to furnish all materials, equipment, labor and supplies necessary to perform the following items of Contractor's prime contract with the City of Mobile.

* * *

[itemization of work]

* * *

One superintendent acceptable to the Contractor, to be assigned to the project full time until items are completed by the Subcontractor to the satisfaction of the Contractor and Owner.

3. Contractor shall pay Subcontractor [$321,550.00 for the November 1971 contract, which was subsequently reduced by $19,600.00 with the deletion of item 35, 36, 39, and 40, and $232,709.20 for the January 1972 contract], subject to any adjustments for variations in quantities for the performance of the Bid Items set out in Paragraph No. 2, heretofore. Contractor shall pay monthly to Subcontractor a portion of the above price based on estimates approved and paid by the Owner and representing that percentage of the gross amount set out above which is reflected in the work performed by Subcontractor under the monthly estimate, less an amount equal to Ten Per Cent (10%) of such sum due Subcontractor which represents retainage withheld from Contractor by the owner. Said retainage shall be paid to Subcontractor when actually received by the Contractor.

* * *

6. Subcontractor shall be paid on estimates of work performed within five (5) working days from the date of the estimate paid by Owner to Contractor.

* * *

8. Subcontractor agrees to start work immediately upon notification by Contractor and to prosecute the work diligently and continuously with sufficient equipment, materials and supplies, together with sufficient men so that the work hereunder can proceed as quickly and expeditiously as possible and so as not to delay contractor from completion of the prime contract within the time limits stated therein. It is agreed that time is of the essence in the performance by Subcontractor hereunder.

9. Subcontractor shall cooperate fully with all other Subcontractors employed in performance of the work on this project and shall so plan and conduct its work to be performed hereunder so as not to interfere with either their operations or those of the Contractor. It is further understood and agreed that all scheduling and performance of work by Subcontractor hereunder will be subject to the direction and control of Contractor so that Contractor can assure performance of his Contract with the City of Mobile without any unnecessary delays to Contractor. If, in the

event Subcontractor is not pursuing his items of work with diligence and proper and sufficient equipment to expedite in accordance with Contractor's scheduling, Contractor may require additional man power and equipment to be provided by Subcontractor.

10. If Subcontractor fails to prosecute the work diligently, Contractor may elect to give notice in writing of the default, and if Subcontractor within a period of seventy-two (72) hours after such notice, shall not correct the defects and defaults, then Contractor shall have full power and authority, without process of law and without violating this Agreement, to take the prosecution of the work out of the hands of Subcontractor and complete it with his own forces or contract with other parties for its completion or use such other measures as in Contractor's opinion are necessary for its completion, including the use of the equipment and other property and materials of Subcontractor on the job. Neither by taking over of the work nor by his completion of the work in accordance with the terms of this provision shall Contractor forfeit his rights to recover damages from Subcontractor for failure to complete or for delay in completion. Should the expenses incurred by Contractor in taking over and completing of the work be less than the sum which would become payable under this Agreement

if said work had been completed by Subcontractor then Subcontractor shall be entitled to the difference. On the other hand, should such expenses exceed the sum due, then Subcontractor shall be liable to Contractor for the amount of the excess. Upon taking over of the work by Contractor under this clause, no further payment will be made to Subcontractor until the work is completed and all moneys due or which may become due Subcontractor under the Agreement will be withheld and may be applied by Contractor to payment for materials, supplies, equipment and labor used in the prosecution of the work and/or for the payment of rental charges on equipment used thereon or to the payment of any excess cost to Contractor for completing said work.

* * *

27. The November 1971 subcontract provided in paragraph 2 for the performance of the following items of work:

Item No.	Description	Unit	Qty.	Unit Price	Amount
1	Clearing & Grubbing Access Road	LS		$ 3,250.00	$ 3,250.00
2	Clearing & Grubbing of lagoon area	LS		42,000.00	42.000.00
3	Excavating, fill, & grading of access road			55,000.00	55,000.00
5	Clay Blanket	SqYds	300,000	176,000.00	176,000.00*
22	Chain Link Fence	LS)			
23	22' Vehicular Gate	LS)		21,950.00	21,950.00

Item No.	Description	Unit	Quantity	Unit Price	Amount
24	3' Pedestrian Gate	LS)			
33	Clearing & Grubbing of Ala. Power Canal	LS		$ 3,750.00	$ 3,750.00

*All quantities over or under 300,000 square yards to be paid or deducted at a unit price of $0.33 per square yard.

20b

Items 35, 36, 39 and 40 were also included in the first subcontract initially but were subsequently removed by an addendum. Paragraph 2 of the January 1972 contract lists the following items of work:

Item No.	Description	Quantity	Unit Price	Amount
10	Force Main Entr. Pipe & Struct. (Subcontractor will furn. all conc. reinf. stl., labor, equip., & supplies to compl. force main entr. pipe & struct. Contractor to furnish mat'l & labor on piling, pipe mat'l & pipe straps.)	LS		$30,000.00
11	Emergency Basin Outlet (Subcontrac-	LS		$17,852.00

Item No.	Description	Quantity	Unit Price	Amount
	tor will furn stl., labor, equip., & supplies to compl. emerg. basin outlet. Contractor to furn. pipe.)			
12	Lagoon Outlet Pipe & Struct. (Subcontractor will furn. all conc., reinf. stl., labor, equip., & supplies to compl. lagoon outlet pipe & struct. Contractor to furn. pipe.)	LS		25,000.00
13	Aerator Loading Dock (Except	LS		$10,000.00

Item No.	Description	Quantity	Unit Price	Amount
	mat'l & labor for piling.)			
14	2" Bit. Slope Protection	28,000 sy	$ 1.61	45,080.00
15	Shell Blanket for Riprap	120 sy	2.50	300.00
16	Riprap	120 sy	9.38	1,125.60
17	Shell Surface Roads	18,000 sy	1.21	21,780.00
18	Grass & Top Soil	20 ac	2,040.00	40,800.00
19	Temporary Grass	20 ac	150.00	3,000.00
20	Solid Sod	200 sy	2.48	496.00
21	Mulching	12 ac	247.00	2,964.00
27	Transformer Station	3 ea	220.00	660.00

Item No.	Description	Quantity	Unit Price	Amount
	(Subcontractor to furn. conc. & reinf. stl. and all lab. supplies, to constr. conc. pads for transformers.)			
28	Control Buildings (Except electrical)	3 ea	5,000.00	15,000.00
35	Shell Blanket	1,500 sy	2.50	3,750.00
36	Riprap	1,500 sy	9.38	14,070.00
39	Shell Blanket	70 sy	2.50	175.00
40	Riprap	70 sy	9.38	656.60
				$232,709.20

28. The January 1972 contract was later modified by the August 1972 addendum, under which Port City agreed to perform part of item 4 (excavation, filling & grading for aerated lagoon) for $32,000.00, part of item 37 (extension of force main entrance piping) for $19,-850.00, and certain work under change order No. 1 (an additional extension to the force main entrance piping involving additional bents and piping on a unit price basis) for an estimated $9,177.00. The wording of the addendum with respect to the work to be performed under item 4 is as follows:

> [Subcontractor shall perform] "That Part of Item 4" that requires grading up the sand dike to the proper elevations preparatory to placing the clay blanket and including the grading and dressing of all demucked materials on the side slopes inside and out of the lagoon area. It includes draining any impounded water to insure proper grading and generally shaping to meet owner's approval prior to placing blanket and all for the consideration of $32,000.00 (Thirty-Two Thousand Dollars) lump sum.
>
> In performance of this portion of Bid Item 4, subcontractor shall furnish all labor, equipment, supplies, and materials necessary to perform said work. Contractor shall furnish all necessary engineering in performance of this bid item.

29. Although Port City disputes the execution of a letter agreement dated August 17, 1972, at the top and August 16th in the body, the Court finds that Port City did enter into said agreement and that it was executed by its president B. G. Quinnelly. Under this agreement, Port City was to place all of the berms provided for on drawing No. 15 for $11,000.00.

30. Port City entered into a second letter agreement with Potashnick dated October 25, 1972, whereby Potashnick agreed to pay Port City an additional $12,900.00 for the spreading of certain excavated material.

31. In addition to the work provided for by the agreements set forth above, Potashnick paid Port City pursuant to a verbal agreement a total of $22,917.65 (less retainage) for certain work involved in moving sand from excess areas to deficient areas and for disposing of excess sand. Potashnick also paid Port City $978.03 in the summer of 1972 on invoices submitted during the job for certain items of extra work and acknowledges an indebtedness to Port City of an additional $1,677.17 on invoices for extra work which invoices were submitted shortly before Port City left the job on or about June 23, 1973.

IV. *Potashnick's Claim Against Port City and USF&G*

A. *Overrun*

32. Potashnick was required to perform a considerable amount of work after Port City left in order to complete the work that Port City had contracted to perform. Paragraph 10 of the subcontracts provides that if the contractor incurs expenses in taking over and completing the work after the subcontractor has defaulted, the contractor is entitled to any excess of these expenses over the amount of money that would have been due the subcontractor had it completed the work. After Port City left, Potashnick gave Port City and USF&G proper notice of Port City's default and thereafter kept detailed records of the expenses that it incurred in completing Port City's work. These expenses were broken down by item number under the contract and into several various categories of expenses such as labor, repairs, materials, outside services, equipment rentals, and other categories. The last progress payment that was made to Port City was based upon work completed through the end of April of 1973. Subsequently a progress payment schedule was prepared for work completed through May of 1973, which provided for a payment for only a small amount of work in the item for grass and topsoil, but this progress payment was not made since Port City left the job prior to the City paying Potashnick for the work performed in May. The following is a compilation of the revenue which would have been earned on each item after May 31, 1973, by Port City had it completed those items, together with the expenses incurred by Potashnick per item and the overrun or underrun (in parentheses) for each item.

ITEM NUMBER	DESCRIPTION	REVENUE EARNED	EXPENSES INCURRED	OVERRUN OR (UNDERRUN
1	Clear & Grub, Ac.Rd	$ 162.50	$ 360.98	$ 198.48
2	Clear & Grub, Lagoon	8,400.00	9,087.38	687.38
3	Exc.Fill&Grd.Ac.Rd.	5,500.00	20,916.53	15,416.53
4A	Grading & Dike Shape	1,600.00	5,664.42	4,064.42
5	Clay Blanket	7,189.49	24,393.43	17,203.94
10	Force Main Entr. P&S	1,500.00	186.46	(1,313.54)
11	Emer. Basin Outlet	892.60	351.32	(541.28)
12	Lagoon Outlet P&S	2,500.00	3,537.23	1,037.23
13	Aerator Load. Dock	——	125.92	125.92
14	2" Bit.Slope Protect.	45,379.46	44,033.12	(1,346.34)
15	Shell Blnk. for Riprap	300.00	——	(300.00)
16	Riprap	1,125.60	2,351.09	1,225.49
17	Shell Surface Rds.	20,642.60	11,320.49	(9,322.11)

ITEM NUMBER	DESCRIPTION	REVENUE EARNED	EXPENSES INCURRED	OVERRUN OR (UNDERRUN)
18	Grass & Topsoil	38,331.60		
20	Solid Sod	59.52	53,555.28	12,027.26
21	Mulching	3,136.90		
22, 23 & 24	Chain Link Fence and Gates	21,950.00	41,803.47	19,853.47
28	Control Building	1,500.00	2,985.12	1,485.12
37	Ext. Force M. Pipe	992.50	2,084.33	1,091.83
39	Shell Blanket	2,015.00	837.93	(1,177.07)
40	Riprap	7,560.28	10,242.54	2,682.26
c/o 1	Add. Piping & Bents	1,082.00		
c/o 3	Berm Construction	550.00	1,826.74	194.74
	TOTALS	$172,370.05	$235,633.78	$63,293.73

33. Port City, however, is due $3,672.00 on the May 31, 1973 estimate, $45,016.31 for retainage on work through May 31, 1973, and $1,677.17 for extra work performed and billed on five separate invoices submitted shortly prior to Port City's leaving the job. The total of these three items is $50,365.48. Offsetting this credit, however, is $1,190.14 for fuel purchased and paid for by Potashnick for the use of Port City in May of 1973. This leaves a net credit to Port City of $49,175.34. Subtracting this amount from the $63,293.73 overrun leaves a balance due to Potashnick of $14,118.39 for the expenses incurred in excess of revenue for completing Port City's work. The amount claimed here and allowed to Potashnick is all for direct costs and does not include any profit or overhead. The contract does not provide for any allowance for profit to Potashnick, and, while overhead would normally and properly be added here, such is not done since the question of Potashnick's overhead is covered later in the discussion of the claim for delay.

B. *Delay*

34. In addition to the claim for overrun, Potashnick has made a claim against Port City for extra costs due as a result of Port City's delay in the completion of its work. Had Port City performed diligently and properly as it contracted to do and had no other fault contributed, the job would have been completed by March 30, 1973. As a partial result of Port City's delay, the job was not complete until November 5, 1973, although

thirty days of this period was the result of delay by the City rather than by Port City. Delay caused Potashnick to incur additional salary expense for the salaries of Reber (project manager), Jenkins (superintendent), and Lescollett (field office manager) for the months of April through August and half of September and for Pattengill (assistant superintendent) for April through the end of September. The total salaries for these individuals for the periods stated was $21,785.00. From this should be deducted $2850.00 of salaries paid to Jenkins and Pattengill during this period of time which were charged directly to Port City as expenses incurred in completing its work. This leaves a net salary overhead claim of $18,835.00.

35. In addition to this, Potashnick incurred additional field office overhead as reflected by the utilities expense, office expense and superintendent's expense items as coded on his IBM cost account codes. These items would normally be posted in one month for the expenses incurred in the preceding month and accordingly the Court finds that the additional field office overhead expense caused by delay should be determined by taking the costs posted for these items for the months of May through December 1973, which equals $6,780.45.

36. Potashnick also incurred additional expenses at his home office as a result of the delay. The total receipts on the contract for the months of April through November of 1973 equal $464,240.10. A reasonable

overhead allowance for home office overhead would equal 3% of that amount, or $13,927.20.

37. Furthermore, delay in completion of the work delayed Potashnick's receipt of his retainage by six months. The Court finds that Potashnick was damaged by this in an amount equal to at least 3% (six months interest at 6%) of the retainage due for work performed through March 31, 1973 ($26,954.60) which equals $6,808.64.

38. The delay past March 30, 1973, with the exception of the thirty day delay caused by the City, which is referred to above, was caused by Port City's failure to prosecute its work diligently and Potashnick's lack of tight supervision of the progress of the work. Consequently, Port City and Potashnick are liable for the liquidated damages which Potashnick must pay to the City in the amount of $63,000.00.

39. To summarize, Potashnick was damaged by delays in the following amounts: $18,935.00 for supervisor's salaries, $6,780.45 for field office overhead, $13,927.20 for home office overhead, $6,808.64 for delay in receipt of retainage and $63,000.00 for liability to the City for liquidated damages. The total damage for delay is $109,451.29.

Since the evidence is in considerable conflict as to who is responsible for what delay to the job, both Port City and Potashnick being guilty of less than diligent

supervision of the progress of the work, it could not be equitable to assess the total cost of delay to Port City. Therefore, only one-half of the costs of delay can reasonably be charged to Port City, or the sum of $54,-725.65.

C. *Port City's Affirmative Defenses Based on Late Payment, Implied Warranty and Misrepresentation*

40. Port City has asserted six separate affirmative defenses to Potashnick's complaint, none of which the Court finds to be sufficient to preclude Potashnick's recovery. The first affirmative defense is based upon an allegation that Potashnick breached the contract by failing to pay Port City on time. While the Court in no manner concludes that this would be a valid defense even if supported by the facts, the evidence in the case clearly shows that in each and every case Potashnick paid Port City within five days after receipt by Potashnick of its progress payment from the City of Mobile. This was all that was required by the contract, and consequently Potashnick in no way breached the contract in this regard.

41. Port City's second and third defenses are based upon alleged breaches of implied warranty by Potashnick. Prior to the trial of the case, the Court granted Potashnick's motion to dismiss Port City's counterclaim based upon the same theory. This ruling constituted a conclusion of law, here reiterated that there was no such implied warranty by Potashnick and

thus, as a matter of law, the defense would be insufficient. After the trial of the case, the Court further finds as a matter of fact that, even if there had been an implied warranty by Potashnick, there was no breach thereof since the plans and specifications were sufficient to accomplish their intended purposes.

42. Port City's fourth and fifth affirmative defenses are based upon allegations that Potashnick made misrepresentations to Port City with respect to the plans and specifications. Again the Court finds, as with the defenses based on breach of implied warranty, that Port City has failed to meet the burden of proof showing that there were any misrepresentations by Potashnick with respect to the plans and specifications or otherwise. In fact the evidence affirmatively shows that there were no such misrepresentations, and certainly none by Potashnick.

D. *Port City's Affirmative Defense Based on Anticipatory Breach*

43. Port City's sixth defense is that Potashnick committed an anticipatory breach of contract by demanding that Port City level or spread muck on the outside of the dikes, by demanding that Port City construct a drainage ditch on the outside of the dike, and by further stating in a meeting on June 19, 1973, with Port City and USF&G that, if Port City did not so perform, Potashnick would declare it in default of all subcontracts and that the work would be performed by

Potashnick and charged against Port City and USF&G. The Court finds that Port City has failed to meet its burden of proof with respect to the defense.

44. The basic written document involved in this dispute as to Port City's obligations with regard to the muck is the August 1972 addendum. Potashnick contends that it was the intent of the parties that Port City was to spread and level all of the muck as necessary pursuant to that agreement. Support for this contention is found in a memorandum made by B. G. Quinnelly prior to the entering of the contract that Port City was to remove muck where necessary and to shape the muck on the slopes. The language of the addendum itself is not absolutely clear but, considered in the light of the surrounding circumstances and the subsequent conduct of the parties, the Court concludes that it was the intent and understanding of the parties that Port City move all of the muck to the extent necessary. Consequently, Potashnick was completely within his rights in making the demands upon Port City that he made. The interpretation urged upon the Court by Port City that it was to spread only the muck from the theoretical toe upwards is unreasonable and inconsistent with sensible construction practices. The testimony clearly showed that the demand to dig a drainage ditch outside of the south dike was in lieu of moving the muck there and constituted a reduction of the contractual obligations of Port City rather than the imposition of any additional obligation. Furthermore, even if Potashnick had been in error in his interpretation of the obli-

gations regarding muck removal, his interpretation was made in good faith and, as such, would not constitute a basis for an anticipatory repudiation of contract. Furthermore, the amount of work involved was not of sufficient magnitude to constitute a breach of the entire contracts.

45. Potashnick had always insisted that it was Port City's obligation to perform this work. At the meeting of June 19, 1973, he insisted that Port City perform more diligently the numerous items that it was behind schedule on at that time. He also announced that he would be forced to take action if Port City refused to comply. The vast majority of Potashnick's demands related to work which Port City did not dispute was its obligation to perform, and, in fact, Quinnelly stated at the meeting that the work, including the ditch and muck, was no real problem. He also said that he had the men and equipment to do the job and that he would. Nevertheless, Port City made no effort to do this work in a timely manner as required but merely loaded up all of its equipment over the weekend and left without giving any prior notice. Now it attempts to assert the muck issue as a defense to Potashnick's valid claims based on Port City's breach of contract. After Potashnick stated his demands, Port City continued to work on the project and the Court finds that the outside muck dispute was not the reason for Port City's leaving but rather is merely an after-the-fact excuse. The demands complained of by Port City did not constitute a repudiation of the contract by Potashnick but instead

were an insistence by Potashnick that the contract be complied with. Further, even after Port City left, Potashnick wrote Port City requesting that it return and complete its obligations under the contract but Port City did not avail itself of this opportunity. This request is not consistent with the repudiation claimed by Port City.

E. *USF&G's Liability On Its Bonds*

46. USF&G, in its answer, adopted all of the affirmative defenses of Port City and added an additional defense that it was not liable on the bonds due to material alterations of the contracts between Port City and Potashnick. The Court finds that there were no material alterations of the contracts. The August 1971 addendum was specifically approved by USF&G and the amount of the bond was increased as a result thereof. USF&G did not specifically approve of the August 17, 1972 letter agreement regarding the berms or the October 25, 1972 letter agreement for additional payment on the muck. Nevertheless, it was aware of these agreements by virtue of the correspondence provided it but chose to ignore the entire situation, at no time expressing any disapproval of these relatively minor agreements. The letter agreement regarding the muck was in fact merely a promise by Potashnick to pay additional money to Port City and did not increase Port City's obligations under the contract. See findings of fact 44, 45, 92, and 93. As to the August 17th letter

agreement regarding the berms, USF&G has not been held liable for any additional cost in completion of the berms since, as reflected above, the total overrun for the berms and for the additional piping and bents was only $194.74, and Port City had retainage on the berms alone credited to it in the amount of $1,045.00, which would more than offset this very small overrun. With respect to the damages for delay, there were ample extensions of time given in the change orders and by the City's letter extending the time to March 30, 1973, to more than compensate for any additional time that might have been added as a result of the addition of the berms after the deletion of explosive stabilization. Consequently, USF&G has failed to prove its only additional affirmative defense. USF&G acknowledges execution of the performance bonds covering Port City's contracts of November 1971 and January 1972, including the August 1972 addendum, and the damages which Potashnick suffered as a result of Port City's breaches of those contractual agreements are covered by the bonds.

V. *Port City's Claim Against Potashnick (Including Brunson's Claim)*

A. *The Various Causes of Action Asserted*

47. As stated above in finding of fact 2, Port City's counterclaim consists of six separate counterclaims although the damages asserted under each of the counterclaims are substantially the same. The Court

has already disposed of several of the counterclaims in findings above, which, however, for clarity will be repeated here. The counterclaim for breach of implied warranty is not supported by the evidence in that the Court finds that, even if an implied warranty as to the sufficiency of the plans and specifications existed as a matter of law, there was no breach in that they were proper and sufficient for their intended purpose. Likewise the Court finds that there were no misrepresentations contained in the plans and specifications and certainly Potashnick made no misrepresentation with respect to them since he merely represented to Port City that they were in fact the plans and specifications, which they were. (There were a few relatively minor defects in the plans and specifications and Port City is given credit for the extra work it performed as a result thereof.) In addition, the Court has found that Potashnick did pay Port City on time as required by the contract in that in all instances he paid Port City within five days after the receipt of the funds from the City. The Court is mindful of the fact that Potashnick received a progress payment from the City in August 1972 for berm work performed in July of 1972 and yet did not make a payment to Port City for berm work until the September 1972 payment. Obviously, however, Potashnick could not pay Port City for berm work until the price between them was agreed upon and until an invoice for the work was submitted. Consequently, the Court does not find that Potashnick breached his contract in this regard and that, even if there were a breach, it would be *de minimis*. The Court has made ex-

tensive findings with respect to Port City's contention that Potashnick anticipatorily breached the contract. Based upon these findings, the Court further finds that Port City has failed to prove its counterclaim based upon that theory and that, even if it had proved a breach, it has in no manner proved any damages that it suffered as a consequence of such breach. These findings effectively dispose of Port City's claims under the first, second, third, and fifth Counterclaims, respectively.

48. Port City's fourth and sixth counterclaims both are based upon allegations of extra work, although the sixth allegation contains an additional claim that the contract was materially modified so as to constitute a waiver and abandonment of the contract and thus entitle Port City to a recovery on a *quantum meruit* basis as opposed to a recovery based upon the prices provided for in the contract. With respect to the contention of a material modification of the contract, the Court finds that there was no such material modification. The basis for this finding will be readily evident in subsequent findings dealing with the claims for extra work which will reveal that in fact very little work was done that was not called for by the contract.

49. This leaves for consideration the principal question raised in the lawsuit which is whether or not Port City was required to perform work not provided for in its contracts. It is for this that Port City asserts the vast majority of its claim for damages, although

additional claims are made for various items as to which it contends that it had not been paid in full for the work performed. Port City attached as Exhibits A and B to its portion of the pre-trial order itemizations of its claimed damages. Exhibit A was an itemization of its alleged damages based upon *quantum meruit* theories and totaled $1,817,168.94. The Court has already found that there was no breach of implied warranty, misrepresentation, anticipatory breach of contract, or material alteration of the contract, which were the theories upon which Port City claimed damages based upon *quantum meruit,* and therefore it will not be necessary to make an item by item examination of the damages as listed in Exhibit A. With the exception, however, of the clearing and grubbing of the lagoon and the clay blanket, the damages claimed in Exhibit A are all claimed in Exhibit B and thus will be covered anyway. With respect to those particular items of work, certain additional findings as to the *quantum meruit* claims will be made.

B. *Claims for Loss of Profit*

50. Port City seeks to recover anticipated profit calculated on the basis of 7% for items 15 (shell blanket for riprap), 16 (riprap), 17 (shell surface roads), 18 (grass and topsoil), 19 (temporary grass), 20 (solid sod), 21 (mulching), and 22, 23, 24 (fencing and gates). In addition, Exhibit B should have included anticipated profit claims on items 35 (shall blanket for riprap), 36 (riprap), 39 (shell blanket for riprap), and 40 (riprap),

since claims for these were included in the September summary of Dr. Michael Smith, Port City's expert, which report was the basis for Exhibit B. Port City is entitled to no profit on any items that it did not perform since its failure to perform them was its own choosing and was in fact a breach of its contractual obligations. In addition, there is no basis in the evidence for finding that Port City would have made such a profit had it performed these items and, in fact, the evidence shows that on certain of those items, including in particular item 18 for grassing and topsoil and items 22, 23, and 24 for fencing and gates, Port City would have suffered a substantial loss had it performed. The actual expenses incurred by Potashnick in performing those items (except for some which were never performed) is set forth in finding of fact no. 32 above. Port City is credited with the actual profit or loss on those items as the contract provided for in connection with Potashnick's claim against Port City. With respect to the shell blanket and riprap items, it is obvious that the expenses incurred as stated in finding of fact no. 32 are intermixed, but the net overrun or underrun is unaffected thereby.

C. *Claims for Retainage and Balance Due Under the Contract*

51. Port City's claims for items 1 (clearing and grubbing of access road), 3 (excavating fill and grading of access road), 10 (force main entrance piping and structures), 11 (emergency basin outlet piping struc-

tures), 12 (aerated lagoon outlet piping and structures), 13 (aerator loading dock), 27 (transformer station), 33 (clearing and grubbing for relocation of Alabama Power Co. canal), change order 1A (additional piping), and change order 1B (additional bents) are all for the retainage withheld and for moneys claimed as due to Port City under the contract on the theory that Port City had completed more work on the items than had been allowed in progress payments prior to its leaving the job. It is, however, unnecessary to determine whether or not Port City had completed a greater or lesser percentage of the work than they had been paid for since, in the computation of overrun or underrun as set forth in finding of fact no. 32 above, Port City was given credit for 100% completion of all items and charged with the cost incurred in completing the items. Likewise, with respect to the portion of these claims for retainage, Port City was given full credit for all retainage on all items in finding of fact 33 to offset the overrun and thus is not entitled to collect the retainage again at this point.

52. Exhibit B erroneously omitted claims for retainage and work completed in excess of payments for items 17 (shell surface roads) and 37 (extension force main piping), but these claims, like those in the previous finding of fact, need not be considered as Port City has already received full credit for these items in finding of facts 32 and 33 above.

53. The claim for item 14 (2" bituminous slope protection) is basically the same as the preceding claims

but deserves some special mention. Port City had received no payment for any work done on this item prior to leaving the job. In fact its inability to perform this item efficiently was probably one of the more significant factors in its decision to quit. It had done some work on the item prior to quitting, however, and the work which it did of course reduced the amount of work that was necessary for Potashnick to perform in completing the item. Port City was given credit for the entire contract amount and was charged with Potashnick's total cost of completing the item in finding of fact 32 above and thus is not entitled to any additional payment for this work.

54. Port City's claims 18(A) and 18(B) are for "materials stored on site" and "spreading materials" in connection with the grassing and topsoil item. As with the other items where Port City contends that it has done a portion of the work on the job and not been paid, this work has been fully compensated for by giving Port City full credit for all grassing and topsoil and charging it with the expenses incurred therewith. Also, with respect to this particular item, Port City has been given credit for work performed in the month of May and the retainage in connection therewith as all of the work credited on the May 31, 1973 estimate referred to in finding of fact 33 was for item 18.

55. Port City's claim for item 28 (control buildings) is also in the same basic category as the claims discussed in finding of fact 51 above. Port City had sub-

stantially completed this item but had not paid for the rather expensive doors on the buildings, and Potashnick was required to and did pay for these doors, which substantially increased the expenses incurred by Potashnick for this item. As with the other similar claims, Port City has received full credit for completion of the control buildings and its retainage less the expenses incurred on this item in finding of facts 32 and 33 above.

56. Port City has also claimed for retainage and balance due under the contract on other items which are discussed separately below in connection with the claims for extra work on those items.

D. *Claims for Extra Work*

1. *Proof of Damages*

57. Port City admittedly kept few or no records of any of the costs incurred in performing the alleged extra work other than possibly on a few minor items. Not only did Port City not keep records of the extra work, no invoices were submitted for this extra work by Port City as the work progressed. Port City did submit one invoice for $84,000.00 for extra work on the clay blanket on April 30, 1973, and two invoices for $35,048.70 for extra work on muck on May 28, 1973. Also several minor invoices totaling $3467.75, of which Potashnick has agreed to pay $1677.17, were submitted in late May and early June of 1973. Other than

these and the three invoices for extra work which were submitted and paid in the summer of 1972, none of Port City's invoices for extra work were submitted until September of 1973, over two months after Port City had left the project. Port City attempted to explain its failure to submit invoices for extra work by saying that Potashnick's project manager Blair Reber told them that payment for approved work would be delayed if they submitted invoices for extra work which he did not approve. This explanation, however, was inconsistent with testimony by Mrs. Quinnelly, confirmed by Mr. Quinnelly in an early deposition, and it was disproved by the fact that timely payments were made by Potashnick on May 22, 1973, and June 8, 1973, after the invoices for extras on the muck and clay had been submitted. Port City also failed to submit any written notice of claim, as it was required to do by the contracts and specifications, except for the notice of claim it submitted on the clay blanket. Potashnick also submitted a written notice to the City on this item.

58. The proof of damages on most other items consisted of the opinion of Dr. Michael Ross Smith. Dr. Smith was initially qualified as an expert based upon his stated educational background and qualifications, including a Ph.D. in general engineering. His practical experience was very limited, and he admitted to having no expertise in the field of soil mechanics. Although Dr. Smith admitted that the best way to determine the intent of the plans and specifications was to discuss the matter with the engineers, Dr. Smith never consulted

with representatives of Converse, Potashnick, the City of Mobile or I. P. concerning the alleged difficulties encountered by his client in the construction of the aerated lagoon. The testimony of Dr. Smith reminds the Court of the maxim *"falsus in uno, falsus in omnibus"*. His testimony not only on one issue but on many material issues was false and replete with error even in elementary calculations, and he was shown to be wrong time and time and time again. On at least one occasion it appears that his testimony was willfully false in that he later admitted that he was aware of the fact that he had made a mistake at the time that he gave testimony to the Court but failed to bring that to the Court's attention. Therefore, after having heard his testimony and observing his demeanor, the Court finds that it can give absolutely no credence to the testimony of Dr. Smith.

It should be noted that Dr. Smith's estimate of the reasonable value of Port City's work as a whole would have provided a profit in excess of 80% based upon the assumption that Port City had in fact expended all of the money it claimed it expended on the project. While Dr. Smith impressed the Court at times as being much more interested in proving a claim for Port City than in testifying objectively as a professional engineer, even he virtually admitted that the profit margin which his calculations provided was beyond the point of absurdity. It is also significant to note that Dr. Smith was retained on a contingency fee basis at the time that he made his calculations, which were the basis for Port

City's claims of $1,633,375.65 and $1,817,168.94. His compensation changed from a contingency fee basis only after he had testified in an ancillary action filed in this Court with regard to this matter and after Potashnick had moved to disqualify him as a witness in the lawsuit on the basis of his contingency fee arrangement. As noted, the demonstrated incompetence and extreme bias of this witness directs a finding by the Court that his testimony is of little or no merit and that therefore Port City is not entitled to recover on any items on which reliance on Dr. Smith's testimony is essential in order for it to meet its burden of proof.

2. *Clearing and Grubbing*

59. Under item 2, Port City was obligated to clear and grub the lagoon area to the limits shown on the plans. It performed the majority of this work early in the project and was paid 80% (less retainage) of the $42,000.00 bid for this item in the estimate for the month ending January 31, 1972. Although Port City did perform some additional work in connection with clearing and grubbing subsequent to that date, it received no additional payment as none was due in that Converse never approved any payment by the City to Potashnick in excess of 80% completion prior to the time Port City left. In fact, at the time Port City left, there was still 20% of the work remaining to be done. As with the other items, Port City was given full credit for the contract price, including retainage, less the completion cost in finding of fact nos. 32 and 33 above.

Since the overrun on that item was only $687.38, and since $3,360.00 of the retainage was attributable to that item alone, the previous findings do in effect give Port City a net recovery on the clearing and grubbing of $2,672.62.

60. With respect to clearing and grubbing, Port City also has a claim No. 2(a) for an alleged extra in the "disposal of debris deposited by subcontractor of dike excavation". This work, however, was clearly within Port City's obligations under the contract documents and is not an extra. Furthermore, even if Port City were entitled to recover any payment for this alleged extra work, there is no credible evidence in the record as to the cost or value of this work.

61. Exhibit A to Port City's portion of the pre-trial order in which it itemizes its damages based on a *quantum meruit* theory includes a claim for clearing and grubbing of the lagoon in the amount of $99,760.00. Primarily it bases this claim on the contention that it was forced to perform the clearing and grubbing by hand methods rather than by mechanical means due to the flooding of the lagoon by Trans State during its dredging operations. The Court finds that there is no basis for this claim in that Port City encountered no conditions with respect to clearing and grubbing which it should not have anticipated. Any effect on the difficulty of clearing and grubbing caused by any water that got into the lagoon during the dredging operations was minimal and occurred during a period of time when

Port City was not involved in clearing and grubbing operations. In addition, the only proof of damages for this claim is the calculations and opinions of Dr. Smith, which the Court finds to be unworthy of belief.

3. *Access Road*

62. In addition to the claim for retainage and balance due under the contract for construction of the access road, Port City has also filed two additional claims for extras relating to the construction of the access road. Claim 3(A) is for "additional fill due to prior excavation by others". The plans and specifications contain a profile of the natural ground prior to construction. At some time subsequent to the preparation of this profile, 3,560 cubic yards of material were excavated from the area of the access road, resulting in the necessity of additional fill being placed by Port City. The Court is unsure as to who excavated the material, but it was not Potashnick, Port City, or any other subcontractor of Potashnick, nor had the fact that someone had excavated this material been brought to the attention of Converse. Allowing a 30% shrinkage factor, 4,628 cubic yards (truck bed measure) was necessary to remedy this problem. Port City is entitled to $1.10 per cubic yard for providing this material and 25¢ per cubic yard for placing it as a reasonable value of the materials and work. The total amount due for this claim for extra work is thus $6,247.80. This work was obviously necessary to complete the access road, was for the benefit of the owner of the project, was in ex-

cess of the requirements of the plans and specifications, and was required by Converse. No written claim was made for this work prior to September of 1973 by Port City against Potashnick or by Potashnick against the City.

63. A substantial portion of Port City's total claim is based upon the contention that the fill material used in the dikes, berms and access road subsided after it was placed by Port City to line and grade and that Port City was required to haul in additional material and reshape it to line and grade. The first of these claims occurs in claim 3(B) for "additional fill due to subsidence" on the access road. Undoubtedly the access road did subside somewhat as the material was placed on the natural ground in a swampy area. That it was a swamp was known to all and depicted on the plans. Furthermore, with respect to the access road, there was no undercutting of the unsatisfactory material as was done under the dikes. Consequently, since Port City was required to complete the access road as required by the plans and specifications, it should have anticipated that some subsidence would occur in the access road and that such would be a part of its contractual obligations. Again, even if this work was extra, Port City would not be entitled to recover since there is no credible evidence as to the damages to which it would be entitled, since this claim is based totally upon the calculations of Dr. Smith and upon unsupported guesses as to the amount of subsidence that occurred.

4. *Force Main Entrance, Lagoon Outlet, Aerator Loading Dock and Transformer Stations*

64. Omitting for the time being the claims with respect to the dikes, berms, clay, muck, pumping, and standby equipment, the Court will now consider the claims for several relatively minor items of alleged extra work with respect to items 10, 12, 13, and 27.

65. With respect to the force main entrance piping and structures, Port City asserts its claims 10(A) for "chang[ing] elevation of force main bents" and 10(B) for load[ing], haul[ing], and unload[ing of] force main pipe". The Court finds that this work was a part of Port City's obligations under item 10 and is not an extra. The Court's opinion in this matter is reinforced by the fact that, while Port City performed this work in 1972, no claim or invoice was ever submitted until September of 1973. Furthermore, no evidence was offered to show the amount or cost of work involved other than the September 1973 invoice, which does not constitute evidence of the work done.

66. With respect to the lagoon outlet piping and structures, Port City asserts claims 12(A) for "labor for pulling and resetting piles incorrectly set by others", 12(B) for "excavation at new location for lagoon outlet structure and set form boom" and 12(C) for "breaking out and repouring cradle on outlet structure due to incorrect dimensions by contractor". The Court finds that Port City is entitled to recover $131.47 for claim

12(A). The claim for item 12(B) arises out of the fact that the outlet structure was initially planned to be on the north side of the lagoon and, subsequent to the execution of the contracts, was changed to the south side of the lagoon. The Court, however, finds that this caused no additional work for Port City and, in fact, probably reduced the expenses involved as it was easier to do the work on the south side than the north side. No work was performed on the item prior to the change in plans. The setting of the foam boom was Port City's obligation under the contract and thus was not an extra item. Port City is entitled to $573.32 for item 12(C), which is the amount claimed less the 20% overhead and 7% profit added to the expenses incurred.

67. Port City's claim 13(A) is for "additional due to deviations in plans and specifications" relating to the aerator loading dock. As to this item, the Court finds that Port City is entitled to $362.75 for additional expenses incurred in erecting the monorail as a result of a piling being driven in the wrong place. In addition, the Court finds that Port City is entitled to $484.57 for constructing steps on the loading dock which were not shown in the plans and specifications.

68. Claims 27(A) and 27(B) are for an "extra pad" for the transformer stations and "additional labor to change forms due to engineering change". Since Port City was required to provide four pads as opposed to the three provided in the sub-contract, it is entitled to the contract price of $220.00 for the extra pad. The size

of the pads was reduced from 6' x 9' to 6' x 6'. The reduction in the size of the pads consequently resulted in a reduction of the amount of concrete and material required, which would offset the alleged claim by Port City of $153.40 for reworking of the steel and forms. Although there is no detailed evidence as to the dollar value of the material saved, there is no detailed evidence as to the amount of the claim, and it is obvious that the size of the pads would not have been changed had anyone thought that the contractor would attempt to impose an additional charge for reduction in the size of the pads when the concrete had not even been poured.

5. *Grading and Shaping Dikes*

69. Port City has asserted five separate claims dealing in one way or another with grading and shaping of the dikes. The first such claim is claim 4, which is for the retainage and the balance due under the contract for the $32,000.00 specified for Port City's portion of item No. 4 which was covered in the August 1972 addendum. As with all other such claims of Port City, it is unnecessary to consider them because Port City has been given credit previously for all contract items due and all retainage less the expenses incurred by Potashnick in completing the work.

70. The next two claims dealing with the dikes are claims 4(A) and 4(B) for hauling sand into material deficient areas and for disposing of excess sand. These

claims arise out of the fact that Trans State did not dredge in the proper amount of sand needed for the construction of the dikes and berms at all of the various locations around the dikes. Consequently, additional sand was needed in order to construct the dikes and berms in some areas, and in other areas there was more sand than was needed. Because of this fact, Potashnick agreed to pay and did pay Port City $17,-377.65 for hauling 38,617 cubic yards of fill from areas where there was access sand to areas where there was deficient sand at the rate of 45¢ per cubic yard and $5,-610.00 for disposing of 18,700 cubic yards of excess sand at the rate of 30¢ per cubic yard. The 30¢ per cubic yard work involved the pushing out of excess sand from the dikes with bull dozers, and the 45¢ per cubic yard work involved the hauling of sand from one location or station on the dike to another with scrapers. The Court is unimpressed with the testimony of B. G. Quinnelly and Dr. Smith to the effect that the work claimed in claims 4(A) and 4(B) is in any way different from the work paid for by Potashnick during the job at the rates of 30¢ and 45¢ per cubic yard. Furthermore, the amounts claimed in 4(A) and 4(B) are based upon incorrect and inaccurate computations by Smith which are unworthy of belief.

71. Claim 4(C) is for relocating dikes due to field engineering errors by R. B. Potashnick. It is significant to note that this claim alone is for $89,627.63, which is almost three times the amount that Port City agreed to for all of the work it was to do under item 4

including grading and shaping of all the dikes. The magnitude of this claim is explained in part by the fact that Dr. Smith used the wrong formula to determine the area of a parallelogram, and the formula he used produced a result approximately three times the correct one. Of all the engineering errors claimed with respect to this entire litigation, this particular error of Dr. Smith was probably the most glaring, although it was by no means his only one. Although Port City claims that engineering errors occurred on the north dike, the south dike, the outer east dike, and on two different occasions on both ends of the emergency basin, the Court finds that the only field engineering error in connection with the dikes committed by Potashnick occurred on the eastern end of the north dike. In order to correct this error, it was necessary to use a bulldozer and an operator for approximately two days and for this extra work, Port City is entitled to a recovery of $500.00, which is based upon a rate of $25.00 per hour for two 10 hour days.

72. Claim 4(D) is Port City's largest single claim, being in the amount of $404,510.00, and is for hauling sand and reshaping dikes due to subsidence. The keyway was excavated to a depth of seven feet below sea level, and the sand was pumped into the excavation. Converse, Potashnick, and Trans State all anticipated that some subsidence would occur when the sand was dredged in, and the borings taken by Thompson in the summer of 1972 after the sand was dredged in but before it was graded and shaped show that subsidence

had occurred to varying depths around most of the project. Obviously any subsidence that occurred prior to the commencement of grading and shaping of the dike by Port City would have had no adverse effect whatsoever on Port City. B. G. Quinnelly, and possibly one or more other witnesses for Port City, testified that on some occasions the dike was graded and shaped to proper elevation and later was discovered not to be to such proper elevation and that it was necessary to haul additional sand to grade and shape the dikes back to proper line and grade. There was, of course, much sand hauled on the project by Port City's scrapers to take care of deficiencies in various areas for which it was paid by Potashnick at the rate of 45¢ per cubic yard as set forth above. There are no entries in Port City's diaries to substantiate any hauling of sand due to subsidence. Numerous witnesses for Potashnick testified that to their knowledge the dikes were never brought up to final line and grade and subsequently discovered not to be at final line and grade. Even if this did occur, it is just as likely that the necessity to bring the dikes back up to final line and grade resulted from compaction or displacement of the sand by the equipment working on it or by the effects of wind and rain as opposed to subsidence and that this compaction or displacement was due to Port City's failure to properly compact the dike.

73. Dr. Smith made borings at one particular station on the dike at night in March of 1973 and used these borings for his calculations of the subsidence upon which Port City's claim was based. The boring

logs introduced by Port City and upon which Smith made his calculations were confusing to say the least, and Smith himself indicated an inability to understand them. His calculations initially were based upon the assumption that all subsidence occurred after Port City started grading and shaping the dikes, although he did subsequently admit that some subsidence had occurred during dredging. Smith then attempted to allow some credit for the subsidence that occurred prior to Port City's commencing work on the dike, basing his calculations upon his interpretations of Thompson's borings. The Court finds that any experienced contractor who examined the site as required and reviewed the soil data which was made available to all prospective bidders (although Port City knew this data was available it did not examine it) would certainly anticipate that there would be some subsidence. In support of Port City's claim that there would be some subsidence, Dr. Smith attempted to extrapolate boring data obtained at one single location as representing conditions around the entire perimeter of the dike. Lynn Doyle, the soils engineer, demonstrated this conclusion was certainly not scientifically sound from an engineering standpoint. Indeed, the Court after hearing the testimony finds Dr. Smith's conclusions concerning subsidence to be of no benefit.

Lynn Doyle, who was in the employ of Thompson at the time of the borings, interpreted the borings significantly different than Smith, and the Court finds that Doyle's interpretation is correct and Smith's incorrect. Based in part upon Doyle's interpretation of

the borings and Doyle's testimony that any subsidence which occurred would have occurred at the time of dredging or shortly thereafter, the Court finds that there was no subsidence of the dike that had any adverse effect upon Port City. Another fact which strongly indicates that this finding is correct is that no one could explain where the vast quantity of sand which Port City claimed it hauled due to subsidence came from. Furthermore, even if the Court were of the opinion that some subsidence had occurred that affected Port City, there is no credible evidence upon which the Court could base an award of damages, since the only testimony in this regard was that of Dr. Smith, which testimony was speculative, uncertain, inaccurate, and based upon unproved facts.

6. *Berms*

74. Port City has asserted four separate unnumbered claims in Exhibit B with regard to berm construction. The first of these claims is in the amount of $1595.00 and is for the retainage and the balance due on the $11,000.00, which Potashnick agreed to pay Port City with respect to berm construction. Port City has already been given credit for these amounts and thus they will not be credited again at this time. The other three claims arise out of the denial by Port City of the execution of the written agreement dated August 17, 1972, in which Port City agreed to place all of the berms for $11,000.00, and out of a claim for subsidence with respect to the berms.

75. Change order 3 to the contract between Potashnick and the City was informally approved on July 20, 1972, and Potashnick was notified on that date that it could commence work. Construction of the permanent berms on the outside of the north dike was begun on July 21, and by August 2, a large portion of the outside berm on the north dike and on the south dike was completed. On that date, the location, size, and shape of the inner berm on the south dike was approved, and by August 7, or thereabouts, the outer berms on the north and south dikes and the inner berm on the south dike had been completed to elevations 7 on the inside and 9 on the outside. Subsequently, additional meetings took place between Converse, Thompson, and engineers for I. P. to finalize the exact locations, sizes, and shapes of the berms, and on August 11, drawing no. 15 was promulgated showing the locations, sizes and shapes of the berms. B. G. Quinnelly was shown a copy of this drawing on August 11th, and on August 12th he agreed on behalf of Port City to place all of the berms for $11,000.00. This verbal agreement was confirmed by a written agreement signed by Mr. Quinnelly on August 16th or 17th, the document bearing one date at the top and another at the bottom. The berms were subsequently constructed in accordance with drawing no. 15, and Port City invoiced Potashnick 70% of the $11,000.00 on September 1st, 20% on November 9th, 1972, and 5% on January 4, 1973, which amounts were paid in due course. The remaining 5% has been credited to Port City in previous findings.

76. With respect to the dispute as to whether or not the letter agreement of August 17th was signed by Mr. Quinnelly, there was testimony by Mr. and Mrs. Quinnelly that Mrs. Quinnelly on frequent occasions signed Mr. Quinnelly's name to certain documents and in fact with his authorization signed his name to various letters and other documents related to this lawsuit. Mr. and Mrs. Quinnelly both, however, denied signing the August 17th letter agreement. Two handwriting experts testified for Potashnick; and, after examining the questioned document and numerous handwriting standards executed by Mr. and Mrs. Quinnelly, both concluded that the signature on the questioned document was made by either Mr. Quinnelly or Mrs. Quinnelly. They were unable to distinguish Mr. Quinnelly's signature from Mrs. Quinnelly's signing of Mr. Quinnelly's name. Both testified that this was the first time in their experience that they had ever encountered anyone who could do such an excellent job of copying someone else's signature as Mrs. Quinnelly could and that, in their opinions, it was exceedingly unlikely that any third person, not having the extensive and long-standing experience of Mrs. Quinnelly in copying Mr. Quinnelly's signature, could have written the signature of Mr. Quinnelly on the letter agreement. They further stated that, in their opinions, the signature of Mr. Quinnelly on the lettter agreement was not a tracing or copying. Port City had retained an expert who had examined photographs of the questioned letter agreement and who had made a report of his examination, but this witness was not called to testify.

77. Change order 3 was formally approved by the City of Mobile and executed on August 1, 1972. Although the change order was for an estimated $157,503.80, Potashnick subsequently received a total of only $134,104.90 based upon the actual quantity of berm that was constructed. Port City has contended that the $11,000.00 payment to it for construction of the berms as provided for in the letter agreement is grossly unreasonable and would not have been agreed to in light of the amount that Potashnick received for the berms. This argument, however, completely disregards the fact that all of the material for the construction of the berms came from the sand provided by Trans State under its contract with Potashnick and that Port City provided absolutely no material but only the labor and equipment necessary to push it into shape. Furthermore, in those incidences where there was not sufficient sand at each station for the construction of the dikes and berms, Port City was paid additional compensation at the rate of 45¢ per cubic yard to haul the sand into place. As to Potashnick's receipt of $134,104.90 under change order 3, it must also be recognized that this change order deleted from Potashnick's contract a net amount of $92,000.00 for additional fill which was to be utilized for explosive stabilization. Potashnick had contracted on a lump sum price with Trans State to provide this material, which had in fact been provided and paid for, and Potashnick received no deduction on his contract with Trans State because of the deletion of the explosive stabilization. It was in effect this additional material that had been provided by Trans State (dredging was completed on July

18, 1972) that was subsequently available and used for berm construction. In addition the Court finds that the $11,000.00 was a fair and reasonable price (although this finding is not necessary, since Port City would be bound by its agreement regardless) for the berm work done by Port City and that $11,000.00 for the alleged test berm alone as Port City contends, would have been grossly exorbitant.

78. With respect to the subsidence claims for the berms, the Court finds that there was no representation that the berms would not subside below the natural ground level, and, in fact, any reasonable and sensible contractor would certainly have realized that when the sand material was placed on the natural unexcavated ground or on the muck piled up on top of the natural unexcavated ground, it certainly would have subsided to some extent. Port City's obligation was to bring the berms up to the elevations shown on drawing no. 15, and it did no more than this. Furthermore, as to just what subsidence did in fact occur, the Court's findings with respect to subsidence of the dikes would also apply generally to the berms. Consequently the Court finds that Port City did not perform any extra work in the construction of the berms due to subsidence and furthermore that, even if it had performed any such extra work, there is no credible evidence in the record upon which to base any award for damages.

7. *Clay Blanket (Port City's Claim)*

79. Port City's claims 5, 5(A), 5(B), 5(C), 5(D), and 5(E) all relate to the clay blanket item, which Port City

agreed to perform for a total of $176,000.00. It subsequently subcontracted this item in its entirety to W. D. Brunson for $160,000.00. Potashnick had substantially underbid this item, having contracted with the City to perform it at the rate of 33¢ per square yard for a total of $99,000.00, based upon the estimated quantity of 300,000 square yards. The 33¢ per square yard unit price in Potashnick's contract with the City was carried over to the Port City subcontract and the Brunson subcontract in that each of those subcontracts provided for lump sum prices as previously stated, subject to adjustment for overages or underages at the rate of 33¢ per square yard. Section 10.31(f) of the specifications provided as follows with respect to the basis of payment for the clay blanket:

> The unit price bid shall be compensation in full for one square yard of clay blanket one foot in thickness complete in place. Measurement shall be made parallel to the completed surface to the nearest square yard. Where the blanket thickness is indicated or authorized to be greater in depth than one foot, the area to be paid for will be increased by ratio of the depth indicated or authorized to one foot. As an example, if a depth of 2 feet is indicated, payment will be made at the rate of 2 square yards for each square yard of surface area measured.

The plans indicated that the clay blanket would be two feet in thickness everywhere that it was to be placed.

80. Prior to Port City's leaving the job, it was credited with 90% completion of the clay blanket item, which equaled $158,400.00. Deducting from this the 10% retainage, Port City was paid $142,560.00. Its first claim in connection with the clay blanket is for $33,-440.00, which is the difference between the amount paid and the $176,000.00 price provided for in the contract. The total quantity of clay placed for pay purposes, however, was 268,453 square yards as is shown by the final estimate submitted by Potashnick and approved by Converse. This constitutes an underrun of 31,547 square yards, which at 33¢ per square yard equals $10,410.51. Therefore the total amount due Port City on the contract is $165,589.49. In finding of fact 32, Port City has been allowed $7,189.49, which is the difference between the total amount due and the $158,400.00 previously credited on the estimate for 90% of the work. In addition Port City has been given their retainage in full, which would include $15,840.00 retainage on the clay blanket based on the $158,400.00 shown on the April 30, 1973 monthly estimate. Consequently Port City has already been credited in full for the total amount due for clay blanket under its contract, against which it was charged for the expense incurred by Potashnick in completing the clay blanket after Port City left.

81. A major contention by Port City involving construction of the clay blanket is its contention that it could not be constructed as provided for in the plans and specifications. Port City contends that the specifi-

cations require that the clay be dumped on the bottom of the lagoon cell and spread parallel to the dike along the bottom and up onto the side slope. The claim is made by Port City that it was directed to place clay on the bottom of the lagoon cell, but the Court finds that the placement of clay for a brief period of time on the bottom of the lagoon cell was done pursuant to a request by Port City that it be allowed to stockpile clay in that area. The contentions of Port City in this area are another example of its attempts to give a "tortured" interpretation to the plans and specifications rather than a common sense interpretation which the testimony shows any reasonable contractor would apply. Common sense alone would dictate that it was unreasonable for Port City to have assumed that loaded dump trucks could have operated on the bottom of the lagoon on a thickness of clay of two feet. The Court finds that the method ultimately used by Port City for construction of the clay blanket was within the terms of the plans and specifications, although Port City by no means diligently prosecuted that phase of its work.

82. Three test sections of clay blanket construction were performed on December 8th and December 9th of 1972, and it was demonstrated that the clay could be placed satisfactorily with the method described of pushing the material down the side slopes and out into the bottom and that by using this procedure, the clay blanket could be laid on the bottom at a depth of two feet as specified. There was never any contention made by Port City that the clay could not be

placed on the side slopes as provided for by the plans and specifications, and the Court finds that the clay could be placed on the side slopes as well as on the bottom within the meaning of the plans and specifications. Port City, however, was exceedingly inefficient in its execution of the clay blanket construction, which resulted in an overrun of the material used in that in certain areas, because of Port City's inadequate performance, the clay was in fact placed to depths greater than two feet. Since the plans did not indicate or authorize such greater depths and since the increased depths were the result of the fault of Port City rather than anyone else, there can be no additional recovery by Port City for this extra clay. Accordingly, Port City is not entitled to the $87,470.00 claimed for additional clay material or any portion thereof.

83. Even if Port City were entitled to additional payment for clay, the amount claimed is clearly excessive. As stated above, Port City had subcontracted the clay blanket item to Brunson for $160,000.00. When clay material, such as this, is hauled and placed, there will be shrinkage of the material so that construction of one cubic yard in place will require more than one cubic yard truck bed measure. Brunson estimated that it would require 130,000 cubic yards truck bed measure to provide the 300,000 square yards or 100,000 cubic yards in place estimated in the contract. In other words, 1.3 cubic yards truck bed measure equals 1 cubic yard in place. Brunson hauled a total of 155,181 cubic yards of clay material for Port City, which was 25,181 cubic

yards truck bed measure in excess of the estimated 130,000 cubic yards. This 25,181 cubic yards truck bed measure equalled 19,370 cubic yards in place, which equals 58,110 square yards one foot thick. At 33¢ per square yard, which is the contract price for overages, this would equal $19,176.30. The $87,470.00 figure was the result of a computation of Dr. Smith and is typical of the manner in which he inflated Port City's claim.

84. Claim 5(B) in the amount of $58,722.46 is for special equipment due to failure of work methods. The basis of this claim is the contention of Port City that, based on the plans and specifications, it anticipated using D-6 bulldozers to perform the work but, because of the lack of load bearing support of the soil, had to use lighter Case 1150 bulldozers. The plans and specifications in no manner stated what type of equipment should be used and that was strictly a matter for Port City to determine for itself. Since the work was performed in accordance with the plans and specifications, there is obviously no basis for this claim. Furthermore, the amount claimed is for the entire cost of the bulldozers in spreading the material with no allowance or credit given for what it would have cost to spread the material in the manner and with the equipment Port City contended. Consequently, even if there were liability for this item, there is no evidence in the record of what extra cost was incurred.

85. The amount of claim 5(B) is based upon invoices submitted by Port City primarily for its bull-

dozers plus additional cost for other equipment. The testimonial evidence was insufficient to support the amount of work claimed, and Port City's incomplete records do not reflect that this much work was performed either. In addition, Brunson's superintendent made a spot check of the number of hours the Case dozers were utilized in December 1972 and the number was substantially less than the number charged by Port City. Not only that, but Dr. Smith also added 20% overhead and 7% profit on top of the claims for the hourly work of the bulldozers, which hourly rates already included overhead and profit.

86. Claim 5(C) in the amount of $46,686.24 is stated to be for extra cost incurred due to failure of work methods. This claim arises out of the fact that the trucks were unable to operate on the bottom of the lagoon as Port City stated it expected them to and had to operate on the top of the dikes. Because the top of the dikes was not wide enough to allow the trucks to pass, it was necessary to construct turnarounds out of clay, which clay material was subsequently used in the blanket, and the amount of time expended by the trucks in delivering the clay was somewhat longer than it would have taken than if they had been able to drive on the bottom as Port City said it expected. Since, however, the manner that was utilized was up to Port City and was within the meaning of the plans and specifications and was merely the method necessary to get the material to the job, it was within Port City's obligations under the contract and consequently is not extra

work in any way. The $46,686.24 was arrived at based upon a claim for this work by Brunson against Port City in the amount of $36,360.00 to which Port City added its claim for 20% overhead and 7% profit. Although the Court finds that nothing is due for this item, even if any amount was due, it would be substantially less than even the $36,360.00 claimed by Brunson, and no allowance for additional overhead and profit would be made.

87. Claims 5(D) and (E), respectively, are for alleged extra cost incurred in the placement of the clay blanket around the transformer building and around the force main pipe. Port City has totally failed to prove any liability for any extra cost incurred in these two items in that it has failed to show that the work performed was not required by the contract. In fact, with respect to the claim for clay blanket around the transformer building, the Court notes that there was no clay blanket in the area of the transformer building. Furthermore, as has been typical with other such claims, there was no credible evidence as to the amount or cost of the alleged extra work.

88. With respect to the claim by Port City on the clay blanket item based upon *quantum meruit* in which Dr. Smith computed claims 5 and 5(A) to be $77,440.00 and $151,613.80, respectively, the Court finds that, since the work performed was within the scope of the plans and specifications and since no reason exists for justifying a claim other than on the basis provided for

in the contract, Port City is entitled to recover nothing. Even if it were, Dr. Smith's testimony as to the fair and reasonable value of this work is utterly preposterous and deserving of no credence whatsoever.

8. *Clay Blanket (Brunson's Claim)*

89. Brunson's claim against Port City and USF&G, with one minor exception, arises completely out of the clay blanket item and presents several considerations different from those involved in the Port City-Potashnick claim. USF&G's liability to Brunson is based upon the labor and material bonds which it executed covering Port City's subcontracts with Potashnick. Brunson had initially subcontracted to perform all of the work on the clay blanket item. However, after the initial construction method proved unsuccessful, Port City took over the spreading of the clay blanket, and all Brunson did was to deliver the material to the job site.

90. The entire placement operation of the clay was performed and supervised by Port City primarily with Port City's equipment. Since the overrun of material was the result of Port City's inefficiency and misdirection rather than Brunson's, Brunson is entitled to collect from Port City and USF&G for the excess material that it provided. This was 25,181 cubic yards truckbed measure which would equal 19,370 cubic yards in place after allowance for shrinkage. This converts to 58,110 square yards, which, at 33¢ per square yard, equals

$19,176.30. In addition, Port City paid Brunson only $106,972.50 on the contract price of $160,000.00. Brunson is also entitled to $4,959.36 for loading and hauling topsoil to the project. Accordingly, the total amount owed by USF&G and Port City to Brunson is $77,163.16.

91. Port City, however, is entitled to an offset against this for the fair and reasonable value of the work performed by it in the spreading of the clay blanket. The invoices submitted by Port City for the use of its equipment list 1669 hours of work by the Case dozers. Most of these invoices were prepared substantially after the work was performed, and Port City's daily construction reports do not support the hours claimed by Port City. In many cases they do not show that dozers were working on the clay blanket item on the days claimed. In other cases, they show that there were not as many dozers working as were claimed. Furthermore, the daily construction reports provide little or no basis for the number of hours per day claimed, and, in most instances, Port City has claimed in excess of eight hours per day. Additionally, during a portion of the job, Brunson's truck foreman, Mr. Johnson, made spot checks on the number of hours which Port City's dozers were working on the clay blanket, and his records show that substantially less time was spent performing this work than was claimed by Port City. Accordingly, while the 1669 hours would equal approximately 9½ months at 176 hours per month, which is a standard work month of 22 eight hour days,

the Court finds that Port City is entitled to no more than six months rental for the dozers. Also considered by the Court in this reduction is the fact that Port City's poor supervision necessitated at least some increase in the amount of time actually spent performing the work over what should have been spent performing it. For work performed over a relatively long period of time such as the construction of the clay blanket, the fair and reasonable rental charge is based on a monthly rate rather than an hourly rate. If time has been kept on an hourly basis, it is converted to a monthly basis by dividing by 176. This was the method utilized by Potashnick in his computation of his overrun, and the Court finds that this is the most reasonable and the fairest method to use. Furthermore, since this is the method by which Port City was charged for expenses incurred by Potashnick, it is particularly appropriate that this same method be utilized in determining the expenses incurred for which Port City receives credit. A proper monthly rental for a Case dozer, including fuel, operator, and maintenance, for a 176 hour month, is $2525.00. Thus Port City should receive credit for six months at $2525.00 per month or $15,150.00. The Court finds that this sum will adequately compensate Port City in full for any and all work it did on the clay blanket for Brunson. Offsetting this amount from the $77,163.16 due Brunson from Port City leaves a balance of $62,013.16 owing from Port City and USF&G to Brunson.

9. *Muck*

92. Port City's Exhibit B to the pretrial order contains four separate claims in connection with the levelling of the muck. As stated above, this was the material that was excavated from the keyways and deposited on either side thereof. According to the plans, it was to be deposited one-third on the inside of the lagoon and two-thirds on the outside of the lagoon on the south, west, and north dikes, 100% to the inside of the lagoon from the east inner dike and 100% to the outside from the east outer dike. This was basically complied with except on the north dike where additional material was required to be placed on the inside of the lagoon because of the close proximity of the new Alabama Power Company canal. Likewise, on the east outer dike north of the old Alabama Power Company canal, certain of the material was required to be placed in the emergency basin because of the close proximity to the new Alabama Power Company canal, but this material was subsequently removed by Circle for Trans-State. As stated above in findings of fact 44 & 45, the Court finds that it was Port City's obligation under the August 1972 addendum to spread and level all of the muck as necessary. Basically Port City never contended prior to leaving the job that this was not its obligation with regard to the muck on the inside of the lagoon, and only late in the job did it contend that it was not required to spread the muck on the outside. There was, however, a dispute early in the job with respect to the quantity of muck to be spread and leveled on the east end of the lagoon in that Port City erroneously anticipated that only one-third of the muck was to be put into the

lagoon from the east inner dike. As a result thereof, Potashnick agreed to pay Port City an additional $12,-900.00 in a letter agreement dated October 25, 1972. This price was computed based on 30¢ per cubic yard for two-thirds of the total excavation of the east inner dike. Furthermore, Trans State acknowledged that the extra muck from the north dike which was placed inside the lagoon excavation was its responsibility, and it paid Port City $5600.00 for spreading and leveling this extra muck.

93. While it is the Court's opinion that Port City was required to spread and level all of the muck as necessary, the most favorable possible construction of the August 1972 addendum, from Port City's point of view, would be that Port City had to spread and level all of the muck that was necessary in order to prepare the area for the laying of the clay blanket. Port City did no more than this on the south and west dikes, and, to the extent that it exceeded that obligation on the north dike, it was paid extra by Trans State. Undoubtedly it did perform more work on the east end than was necessary merely to lay the clay blanket, but the letter agreement of October 25, 1972, pursuant to which Port City was paid or credited for $12,900.00, required Port City "to spread the demucked material in the area of the inside emergency basin dike to plan grade as specified in the plans and specifications for the referenced project." This clearly included the obligation to spread whatever muck was there to whatever extent required, and Port City did no more than this.

94. As to Port City's claim for $1870.50 for leveling the muck material referred to in said letter agreement, Port City has been credited in full for all payments and retainage under that letter. With respect to the claims for leveling additional muck on the east and for moving the muck on the north, south, and west in the amounts of $48,273.90 and $201,955.80, respectively, the Court finds, for the reasons stated above, that this work was Port City's obligation pursuant to its contractual agreements and that it is not entitled to any additional recovery therefor. Furthermore, as with so many of the other Port City claims, the amount claimed, which was computed by Dr. Smith, is astronomical, unsupported by records or other factual and sufficiently certain evidence, and unrelated to the actual cost involved. In making his computations, Dr. Smith has added vast quantities of muck which he contends was pushed into the lagoon by the subsidence of the dikes and has made other incorrect calculations and assumptions including one blatant error which resulted in a double payment. He recognized this error at the time he testified to it but nevertheless failed to inform the Court that the claim contained a double payment. Port City has no records or other means of determining its costs incurred in spreading and leveling the muck that it contends was extra work and there is no credible evidence in the record which would provide the Court a basis for determining damages even if it had concluded that Potashnick was liable for any extra work with respect to these muck claims.

95. With respect to the claim for remucking on the west dike due to a field engineering error by Potashnick, Port City is entitled to a recovery. It was not required to remuck any area but did in fact have to make an additional pass along the west dike with its dragline because of Potashnick's error, whereas the work could have been done in a single pass had the error not existed. The amount claimed by Port City for this work ($4,-896.54), however, is not supported by the evidence and the Court finds that $1,000.00 is a fair and reasonable allowance for this additional work.

10. *Pumping and Dewatering*

96. Port City has claimed $61,487.11 for pumping and dewatering the lagoon. The pumping and dewatering of the lagoon was work which was incidental to items of work which were Port City's obligations under the contract, such as the clearing and grubbing, the spreading and leveling of the muck, and the construction of the clay blanket. Consequently this work was in no manner extra work to Port City any more than the construction of a scaffold would have been extra work for a painter who had contracted to paint a building. The contract provided that Port City would furnish all materials, equipment, labor and supplies necessary to perform its items of work, and paragraph 10.31(a) of the specifications provided as follows:

> The unit price bid for the various items shall be compensation in full for furnishing all

> materials, labor, equipment, and incidentals for the item in place complete in every respect in accordance with the plans and specifications. There will be no direct payment for bracing, backfilling, cleanup, restoration of property, testing or other items of work necessary for the installation of the item, except as herein specified or shown in the proposal.

The pumping that was performed by Port City was necessary to remove the rainwater and tidal seepage into the lagoon and should have been and was in fact anticipated by Port City. Clearly this was merely incidental to the performance of its work and was not extra work. Furthermore, Port City has again greatly exaggerated its claim, and the amount claimed is greatly in excess of any expenses which could logically have been incurred for pumping, even if it were entitled to any amount. Additionally pumping expenses are claimed for long periods of time unsupported by the evidence and in fact contradicted even by Port City's own daily records, to say nothing of the records of Potashnick and Converse and the testimony of many witnesses.

11. *Standby Equipment*

97. Port City has also claimed $163,197.00 for equipment standby. This total consists of $64,864.00 claimed for the period of May 1, 1972, to August 21, 1972, and $98,333.00 for September 1, 1972, to May

31, 1973. Port City, however, has failed to show any contractual breach or other basis upon which it should be entitled to recovery. The supposed theory for the claim for the first period is that the equipment was standing by because of the delay resulting from the failure of the explosive stabilization program. Port City, however, utilized its equipment during this period of time doing other work on the project and in fact commenced work on the berms a month before the end of that period. It could have started completing its work on all items before the end of the period as the final drawing on the berms was released on August 11, 1972. The claim for this item, which was computed by Mrs. Quinnelly pursuant to instructions from Dr. Smith, totally ignores the fact that the equipment was utilized on other items of work by Port City and was rented out to other subcontractors on the project. The theory behind the claim for the period of September 1, 1972 to May 31, 1973 is difficult, if not impossible, to perceive. Apparently the theory is that the equipment was not able to be used as much during the wintertime as it would have been during the summertime and that the delay caused by the explosive stabilization failure pushed the work from summertime into the wintertime. Port City accepted the extension of time for performance, however, and contends that it utilized its equipment on every available day that the weather would allow it to be used. Consequently, according to Port City's own testimony, it was never standing by during any period of time except on days on which it would have been standing by regardless of whether it

had been on this project or some other project in the area, since the weather would have prevented it from working there also. Not only this, but the rental rates offered by Port City were daily rates instead of monthly rates and were grossly unreasonable in relation to the value of the equipment. In addition, there were numerous discrepancies in the records of Port City relating to the time, manner, and method used in computing its claim to the extent that the Court finds that there was a failure of proof in support of the amount of any claim.

E. *Damages to Business Reputation*

98. Port City's final claim is for $500,000.00 for damage to its business reputation. The Court finds that Potashnick has done no wrongful act which damages Port City's business reputation and furthermore that even if it had, there is no evidence in the record from which the Court would do other than speculate or conjecture as to what, if any, damage was suffered.

F. *Summary of Port City's Claim*

99. In summary, the Court finds that other than the retainage and the balance due on the contracts for which Port City was given credit to offset in part the cost overrun incurred by Potashnick, Port City is entitled to recover from Potashnick the following amounts and no more:

3(A)	Addition fill due to prior excavation by others	$6,247.80
12(A)	Labor for pulling and resetting piles set incorrectly by others	131.47
12(C)	Breaking out and repouring cradle on outlet structure due to incorrect dimensions	573.32
13(A)(1)	Extra expenses in connection with the aerator loading dock monorail due to piling being driven incorrectly	362.75
13(A)(2)	Deviation in plans and specifications requiring extra step in aerator loading dock	484.57
27(A)	Extra pad	220.00
4(C)	Relocation of portion of north dike due to field engineering error by R. B. Potashnick	500.00
Unnumbered	Extra work in connection with mucking on west dike due to field engineering error	1,000.00
	TOTAL	$9,519.91

VI. *Potashnick's Claim Against the City*

100. Potashnick's third-party complaint against the City is based in part on the theory that, if Port City is entitled to recover any sums because the work that it performed was extra work and not included within the contract, then such work would in most cases also be extra work against the City. This proposition is basically correct in that the obligations of Port City to Potashnick were identical to the obligations of Potashnick to the City on most of the items in Port City's contract. Some of the items for which Port City was allowed recovery, however, were not based upon Port City's being required to do work not called for by the plans and specifications but rather were based upon some specific fault on the part of Potashnick. For these items, Potashnick would not be entitled to recover over against the City. The Court does find, however, that the work for which Port City is entitled to recover in claim 3(A) was extra work between Potashnick and the City, and thus Potashnick is entitled to recover $6,-247.80 from the City for this work. The work for which Port City was given recovery based on claims 12(A), 12(C), 13(A)(1), 13(A)(2), 27(A), 4(C) and the west dike engineering error was not extra work between Potashnick and the City but was caused by the fault of Potashnick, and thus Potashnick is not entitled to any recovery for these items from the City.

101. The final estimate submitted by Potashnick to the City shows a payment due by the City to Potash-

nick of $28,440.40 for work covered by the final estimate and $270,534.57 for retainage withheld during the project, for a total of $298,974.74. In addition, Potashnick performed force account work in the amount of $1,422.68. The final estimate and the force account work were approved by the City's engineers, Converse, and are proper, due, and owing to Potashnick. The total amount of these sums is $300,397.65.

VII. *The City's Claim Against Potashnick*

102. The City filed a counterclaim against Potashnick seeking recovery for liquidated damages at the rate of $300.00 per day, based upon the provision therefor in the contract. The contract allowed 365 days for completion, the commencing date to be November 25, 1971. A total of 76 additional days for completion was provided by change orders 1, 3, and 4, extending the final date of completion until February 8, 1973. The City, subsequently, however, in a letter from the City Attorney dated June 21, 1973, advised that liquidated damages would commence on March 31, 1973. As previously stated in finding of fact 24, the project was subsequently completed on November 5, 1973, which consisted of an overrun of 240 days. Thirty days of this delay was the fault of the City because of its failure to have the lagoon filled promptly as set forth in finding of fact 24 above, leaving 210 days delay. The possible causes for this delay were (1) the pushing of the job into the winter months because of the delay resulting from the failure of the explosive stabilization, (2) extra work

caused by defects in the plans and specifications, (3) the poor performance of Potashnick other than that attributable to Port City, or (4) the poor performance of Port City. If the delay was the result of the failure of the explosive stabilization method or extra work due to defects in the plans and specifications, then the City would not be entitled to liquidated damages from Potashnick. The Court, however, finds that any delay allegedly caused by the explosive stabilization method was compensated for in the change order relating to the construction of the berms accepted by Potashnick. Additionally, the Court finds that there was no delay caused by any extra work allegedly resulting from defects in the plans and specifications since the plans and specifications were not defective. Port City's use of unorthodox construction procedures, its lack of proper supervision and failure to use adequate manpower and equipment are responsible for its failure to complete the project on schedule.

The Court, however, finds that, even with the delay caused by the explosive stabilization method, the project could have been completed by March 30, 1973, except for the grassing operation which could not have been done during the winter and for which the City would not have been able to collect liquidated damages since the delay in that work would definitely have been the result of the explosive stabilization failure. Additionally, the Court finds that there was no delay caused

by any extra work resulting from defects in the plans and specifications since the plans and specifications were not defective except possibly in very minor incidents which caused no delay. Potashnick's performance was satisfactory and did not cause any delay in the completion of the job past March 30, 1973, except for the delay caused by the poor performance of Port City. Even though the delay was the result of the poor performance of Port City, Potashnick nevertheless is responsible to the City as he is responsible for the performance of his subcontractors.

103. The Court finds that Potashnick has failed to prove his affirmative defenses to the City's counterclaim for liquidated damages and thus is liable to the City for liquidated damages in the amount of $63,000.00.

104. The City also claims that it is entitled to indemnity from Potashnick for any and all damages awarded in favor of Potashnick against the City and for its cost of defending the claim by Potashnick against the City. In support of this, the City cites a hold harmless clause in the contract. The Court finds that that hold harmless clause was not intended to protect the City from claims against it by Potashnick but rather was to protect the City from claims against it by other parties. Since no other parties have made any claims against the City, it is not entitled to any recovery under the hold harmless clause.

VIII. *Potashnick's Claim Against Converse*

105. Consistent with the Court's prior findings as to Port City's claim against Potashnick and the following findings as to the City's claim against Converse, the Court finds that the evidence does not support any claim of negligence, breach of implied warranty, or misrepresentation by Converse which caused damage to Potashnick.

Therefore, it is unnecessary to make a finding with regard to the affirmative defenses asserted by Converse. The lagoon was built and is functioning in accordance with the design and intent of the plans and specifications.

IX. *The City's Claim Against Converse*

106. The City has also filed a cross-claim against Converse seeking to recover from Converse for any damages for which the City might be held liable in this lawsuit. Converse could certainly not be liable to the City for the City's obligation under its contract to pay the final estimate and the retainage to Potashnick. This leaves only the award of $6,247.80 for which the City might be entitled to recovery from Converse. With respect to this award which is based upon the excavation of the access road by others, Converse is not liable to the City since it in no way participated in the excavation and had no knowledge of the excavation, and the plans which it prepared correctly represented the conditions as they existed at that time.

X. *USF&G's Claim Against Port City and the Indemnitors*

107. Port City and the indemnitors have all agreed in the pre-trial order that USF&G is entitled to all attorney's fees, expenses, and any and all other sums expended in payment of claims or judgments which USF&G might be caused to pay for work and labor claims against Port City and/or USF&G or for work performed on the project by Port City or for the failure by Port City to perform work on the project. The Court finds that USF&G has incurred attorney's fees and expenses in the amount of $59,673.09, and $51,-288.10 respectively, and has been held liable to pay judgments and other sums to creditors including prior judgments in the exoneration action (hereinabove referred to in this paragraph) in the sum of $64,565.44 and the judgment rendered in these actions in favor of Potashnick and Brunson in the total amounts of $71,-889.04 and $67,565.17, respectively.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over all of the parties and the subject matter of this litigation by reason of diversity of citizenship among the parties and the amount in controversy, pursuant to Title 28, U.S.C.A., §1332.

2. The contracts between Port City and Potashnick provided that, in the event of default by Port City, Potashnick, after proper notice, was entitled to com-

plete the work which Port City had contracted to do and to charge Port City for the expenses incurred therein. Port City was, however, entitled to credit for the amount that it would have earned under the contracts had it completed the work, and this credit, along with the retainage due and other credits as set out above, was given to Port City by Potashnick. The net amount due Potashnick for his cost overrun after deduction of these credits is $14,118.39.

3. Pursuant to the contracts, Port City was obligated to prosecute the work diligently and continuously so that Potashnick might be able to complete the contract within the time limits stated. Those time limits were properly extended to take care of the delays incurred by change orders, and the additional extension granted by the City to March 30, 1973, was sufficient to take care of any additional delay resulting from the fault of the City or Converse except for the thirty day delay in filling the lagoon. Consequently, Potashnick is entitled to recover from Port City for its breach of this contractual agreement to perform in a timely manner one-half of the following: (1) the extra overhead he incurred ($39,642.65), (2) the damage due to delay in receipt of his retainage ($6,808.64), and (3) indemnity for the liquidated damages which he must pay the City ($63,000.00). The total amount to which Potashnick is entitled as a result of Port City's delay is $54,725.65.

4. Port City has failed to prove any of the affirmative defenses asserted by it in answer to Potashnick's complaint. 17A C.J.S. *Contracts* §325(1) at 228-235 & 244; *Sioux City and New Orleans Barge Lines, Inc. v. Brunson*, 243 F.Supp. 198, 202 (S.D. Ala. 1965), *reversed on other grounds, Stauffer Chemical Company v. Brunson*, 380 F.2d 174 (5th Cir. 1967), *result affirmed on subsequent appeal after remand*, 409 F.2d 1327 (5th Cir. 1969); *Conway v. Andrews*, 236 So.2d 687, 693-94 (Ala. 1970); *Flagg-Utica Corporation v. City of Florence*, 156 So.2d 338, 243-43 (Ala. 1963); *Hill v. Davis*, 130 So.2d 39 (Ala. 1961); 17A C.J.S. *Contracts* §324 at 224; *Box v. Metropolitan Life Ins. Co.*, 168 So. 220, 222 (Ala. 1936); *Mobley v. New York Life Insurance Company*, 295 U.S. 632, 638 (1935); *Walker v. Shasta Minerals and Chemicals Company*, 352 F.2d 634, 638 (10th Cir. 1965); *Kimel v. Missouri State Life Ins. Co.*, 71 F.2d 921, 923 (10th Cir. 1934); *LeRoy Dyal Co., Inc. v. Allen*, 161 F.2d 152, 155 (4th Cir. 1947); *McAllister-Coman Co. v. Matthews*, 52 So. 416 (Ala. 1910) and *Pasquel v. Owen*, 186 F.2d 263 (8th Cir. 1950).

5. The condition of USF&G's performance bonds was that Port City would promptly and faithfully perform its agreements. This condition was not fulfilled; and, as a result thereof, USF&G is liable to Potashnick for the damages he suffered due to Port City's breaches of contract. USF&G failed to prove not only the affirmative defenses asserted by Port City which it had adopted, but also the separate affirmative defense asserted by it in which it alleged that the contracts between Port City and Potashnick had been materially altered.

6. With respect to its counterclaim, Port City, as a party seeking recovery, has the burden of proof, and this burden of proof relates both to liability and to damages. The Court cannot award any party damages if there is insufficient credible evidence in the record upon which to determine the amount of damages. The Court is mindful of the principle of law that a party will not be deprived of damages because the nature of the damage incurred is such that the proof is difficult. Nevertheless, the Court would be remiss in its duties if it were to base an award of damages upon speculation, conjecture, surmise, or guess work. The case of *Nat Harrison Association, Inc. v. Gulf States Utilities Company*, 491 F.2d 578 (5th Cir. 1974) contains an excellent discussion of the proof required to substantiate an award for damages. Although the case is one that arises out of Louisiana, the pertinent law expressed therein is not unique to any jurisdiction. The Court stated at 491 F.2d 578 as follows:

> "Actual damages must be proven; they cannot be mere speculative or conjectural. * * * While the breaching party should not escape liability because of difficulty in finding a perfect measure of damages, the evidence must furnish data for a reasonably accurate estimate of the amount of damages. * * * It must appear reasonably evident that the amount allowed rests upon a certain basis."

7. As stated in the findings of fact, Port City has failed to prove (1) that Potashnick breached any im-

plied warranty, even if there were any implied in law or in fact; (2) that there was any misrepresentation in the plans and specifications, and particularly that there was any misrepresentation by Potashnick with respect to them; (3) that Potashnick failed to pay Port City on time as required by the contract; (4) that Potashnick committed any anticipatory breach of his contracts; or (5) that the contracts were materially modified. Based upon these findings, the Court concludes that Potashnick is not liable to Port City for any claim under Port City's first, second, third, fifth and sixth counterclaims. Furthermore, Port City's failure in its proof of damages, as set out in the findings of fact, is dispositive of these counterclaims as well as the counterclaims based on extra work, except for the items specifically allowed.

8. Port City's soundest legal theory in support of the claims that it has asserted is the theory contained in its fourth counterclaim, which is based upon the contention that Port City was required to perform extra work above and beyond the requirements of its contracts. In determining whether or not any particular work performed was extra work, the Court must, of course, rely primarily upon the contracts and the plans and specifications, which were incorporated by reference into the contracts. Port City's obligations thereunder were to furnish all materials, equipment, labor and supplies necessary to perform the specified items of work. They included the performance of any work which was incidental to the items that Port City was

obligated to perform. Work is extra work over and above the contract only if it is not contemplated by or embraced in the terms of the original contract. The mere fact that the work encountered may be more difficult than expected, that the contractor had erred in his estimate of the cost of performance, or that the contractor will suffer a loss by performance does not justify the award of any extra work payment to the contractor. *Stone v. Dennis,* 3 Port. 231 (Ala. 1836); *Lee v. Cochran,* 47 So. 581 (Ala. 1908). It is the duty of contracting parties to examine their contracts and to know their obligations prior to incurring them. Consequently, if a party fails to exercise good judgment in entering into a contract and undertakes a hard or unwise bargain, the error in judgment is his, and, in the absence of fraud, the Courts can provide no relief to such party for his own error. *Marx v. Kilby Locomotive and Machine Works,* 50 So. 136 (Ala. 1909); *City of Albertville v. United States Fidelity and Guaranty Company,* 272 F.2d 594 (5th Cir. 1959); *Hawkins v. First Federal Savings & Loan Association,* 280 So.2d 93 (Ala. 1973).

9. Except for those items specified in finding of fact 99, Port City has failed to prove to the Court's satisfaction that it performed any extra work which it was not required to perform pursuant to its contractual agreements with Potashnick. Port City is entitled to a setoff against the amount for which it is liable to Potashnick for the extra work which it did perform. The amount of this setoff is $9,519.91.

10. In determining as a matter of fact that the August 17th letter agreement regarding the berms was executed by Mr. Quinnelly on behalf of Port City, the Court has considered the fact that Port City failed to call as a witness the handwriting expert whom it retained and from whom it received a report. While the Court considers this to be probative evidence on the subject, it would have reached the same conclusion that Mr. Quinnelly signed the agreement without the benefit of this evidence. Port City had gone to the trouble and expense of hiring a handwriting expert to examine the document and to submit a written report, but it did not call the expert to testify. The exact effect of Port City's failure to call its handwriting expert is subject to differing opinions, but, at least, it allows inference that the handwriting expert would have testified adversely to the interests of Port City. *McKim v. Foley*, 49 N.E. 625 (Mass. 1898); *II Wigmore on Evidence*, §290 at page 177 (3rd Ed.); 31A CJS *Evidence*, §156(3).

11. Port City has failed to prove that Potashnick committed any wrong which damaged Port City's business reputation or that its business reputation was damaged, at least in any measurable amount. Essentially Port City's claim is for loss of future profits and the law is exceedingly clear that in order to recover such damages, they must be proved to a much greater probability than Port City did in this lawsuit. The law on this particular subject is set out very well and clear in the case of *Paris v. Buckner Feed Mill, Inc.*, 182 So.2d 880 (Ala. 1966). Consequently, Potashnick is not liable to Port City for such claimed damages.

12. The net amount owed to Potashnick by Port City and USF&G is $14,118.39 plus $54,725.65 less $9,519.91, or a total of $59,324.13.

13. Continental's labor and material bond was issued pursuant to the provisions of Title 50, *Code of Alabama 1940* (Recomp. 1958) §16, which provides in part for attorney's fees. Port City, however, is not entitled to collect any attorney's fees in this case, since the amount to which Port City is entitled under its counterclaims is less than the amount for which it is liable to Potashnick under his complaint. Furthermore, even if Potashnick were indebted to Port City in an amount greater than that which he was entitled to collect from Port City, there would be no liability for attorney's fees unless the amount to which Port City might be entitled was substantially the same as the amount which Port City had demanded in its written notices of claim. *Columbus Rock Company v. Alabama General Insurance Company,* 153 F.Supp. 827, 832-33 (M.D. Ala. 1957); *Central Lumber Company, Inc. v. American Employers Insurance Company,* 15 So.2d 229 (La. 1942).

14. Since Potashnick is not liable to Port City, neither is Continental; and, since Continental has incurred no liability, it cannot recover on its third party complaints against the City and Converse.

15. Potashnick is entitled to recover from the City for the amount owed him for retainage ($270,534.57), the amount due on the final estimate ($28,440.40) and

the amount due for force account work ($1,422.68). In addition, Potashnick is entitled to recover from the City for the extra work which he performed over and above his contract ($6,247.80).

16. The City has asserted as its first affirmative defense to Potashnick's claim for extra work that there was no written notice of the extra work by Potashnick and as its second affirmative defense that there was no written authorization for payment by the City or its agent Converse in spite of the fact that the contract had written provisions requiring written notice and written authorization. However, the extra work that was performed was done pursuant to the request and/or direction of the City and/or its agent Converse, which was the custom and practice followed on this project and relied upon by Potashnick, and the work was a benefit to the City, which the City has accepted. Consequently, the City is liable to Potashnick for the extra work, even though there was no written authorization therefor. The Alabama law on the subject makes it clear that under the circumstances of this case the defense is not a meritorious one. *Allied Mills, Inc. v. St. John*, 152 So.2d 133 (Ala. 1963); *Bonie v. Griffin*, 40 So.2d 870 (Ala. 1949).

17. The third affirmative defense asserted by the City is in reality a counterclaim for liquidated damages and not a true affirmative defense and thus is, of course, no bar to Potashnick's recovery from the City. The City's fourth affirmative defense asserts various

alleged contractual breaches by Potashnick, none of which, even if proved, would constitute a defense to Potashnick's claims for extra work or for retainage and amounts due under the contract.

18. The City's fifth affirmative defense alleges that Potashnick breached the terms of the contract requiring compliance with state law. The defense then goes on to name *Code of Alabama*, Title 37, §476 and *Code of Alabama*, Title 55, §§506 et seq. *Code of Alabama*, Title 37, §46 provides for the presentation of claims against municipalities within two years, except that tort claims must be presented within six months. R. B. Potashnick complied with the provisions of that section to the extent that they are applicable. *Fricke v. City of Gunnersville*, 59 So.2d 590 (Ala. 1952). *Code of Alabama*, Title 55, §§506 et seq. contains provisions which are commonly referred to as the competitive bid law, and the assertion by the City is that there was no competitive bidding for the extra work. Under Alabama law, however, even if competitive bidding was required for the extra work, this would not preclude Potashnick from recovering for extra work which had been performed and accepted by the City. *State v. Fourth National Bank of Columbus*, 117 So.2d 145 (Ala. 1959); *Kimbrelle v. State*, 132 So.2d 132 (Ala. 1961); *City of Prichard v. Moulton*, 168 So.2d 602 (Ala. 1964).

19. The hold harmless provisions upon which the City relies on its counterclaims against Potashnick and Continental were designed and intended to apply to

claims against the City by third parties and not to provide the City a defense to valid claims asserted against it by Potashnick or Continental. Accordingly, the City is not entitled to recover anything from Potashnick or Continental based upon the hold harmless provisions. The City is likewise not entitled to recover on its claim for attorney's fees and expenses based upon the case of *Mason v. City of Albertville,* 158 So.2d 924 (Ala. 1963). While the bond and contract in this case is identical to the one in the *Mason* case, the City in this case has incurred legal expenses not only for the prosecution of the liquidated damage claim but also in a much larger amount for the defense of the claim against it for extra work. Since there is no evidence to show what portion of the legal expenses incurred by the City were for items for which it might be entitled to recovery, it cannot be granted any recovery at all. *Lichter v. Mellon-Stuart Company,* 305 F.2d 216 (3rd Cir. 1962).

20. The City is entitled to setoff against its liability to Potashnick the liquidated damages owed it in the amount of $63,000.00. Subtracting this amount from the amounts due Potashnick by the City leaves a balance owed to Potashnick by the City of $243,640.45.

21. Since Potashnick is not liable for any net payment to the City, Continental is not liable to the City.

22. Based on the findings of fact concerning Port City's claim against Potashnick and the City's claim against Converse, the Court concludes that Converse is not liable for any sums to Potashnick or the City.

23. Brunson is entitled to recover from Port City for the balance due on his contract ($53,027.50) plus the additional amount owed due to the overrun of the material ($19,176.30) and also for the amount due for loading and hauling topsoil to the project ($4,959.36). Port City, however, is entitled to setoff against this sum the amount to which it is entitled for its work in connection with the spreading of the clay blanket ($15,150.00). The net amount owed Brunson by Port City and USF&G is thus $62,013.16.

24. Since Potashnick had, in fact, paid all expenses incurred in the construction of the project as required by the contract and since the completion of the work was approved by the City on November 14, 1973, Potashnick was entitled to final payment within thirty days thereafter, or on December 14, 1973. The City was also entitled to deduct the liquidated damages due it on that date. Likewise, by November 14, 1973, Potashnick had performed all work for which it was entitled to collect damages from Port City. Brunson had completed his work with respect to topsoil and had submitted his invoice on June 27, 1973, and had completed the work and submitted his invoice for the clay blanket work on August 1, 1973. Potashnick is, therefore, entitled to interest from the City on the amounts due him from December 14, 1973, and to interest from Port City and USF&G on the amounts due him from them from November 14, 1973, except for the amount due for liquidated damages which bears interest from December 14, 1973, the date on which the City was en-

titled to deduct the liquidated damages from the amount it owed Potashnick. Brunson is entitled to interest on the topsoil claim from June 27, 1973, and on the clay blanket from August 1, 1973. Interest shall be paid at the rate of 6% per annum where due.

25. USF&G is entitled to judgment against Port City and the indemnitors for its attorney's fees ($59,-673.09), expenses ($51,288.10), and payments or liabilities for payments to Brunson and Potashnick ($139,454.21) including interest, under its bond for a total amount of $250,415.40.

26. Judgment will be entered in accordance with the findings of fact and conclusions of law set forth above, with costs to be taxed in favor of Potashnick, the City, Converse, and Brunson against Port City and USF&G and in favor of USF&G against Port City.

DONE this 26th day of March, 1976.

/s/ W. B. HAND
UNITED STATES
DISTRICT JUDGE

U.S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED THIS
THE 26th DAY OF MARCH, 1976.
MINUTE ENTRY NO. 40432
WILLIAM J. O'CONNOR, CLERK
/s/ J. BETANCOURT
Deputy Clerk.

NOTE: Amendments provided for in Order of May 11, 1976 have been incorporated herein.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2373

R. B. POTASHNICK, an individual,
Plaintiff-Third Party
Plaintiff Appellee,

versus

PORT CITY CONSTRUCTION COMPANY and
UNITED STATES FIDELITY &
GUARANTY COMPANY,
Defendants-Appellants,

versus

THE CITY OF MOBILE, ALABAMA,
Third Party
Defendant-Appellant,

versus

J. B. CONVERSE & COMPANY, INC.,
Third Party
Defendant-Appellee.

* * * * * *

UNITED STATES FIDELITY &
GUARANTY COMPANY,
Plaintiff-Appellant,

2c

PORT CITY CONSTRUCTION COMPANY, INC., et al.,
Defendants-Appellants,

versus

W. D. BRUNSON, d/b/a W. D. BRUNSON CONSTRUCTION COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Alabama

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Filed: Sep. 20, 1976

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants, Port City Construction Company, Inc., et al., for limited remand is GRANTED. Movants and any other party to these proceedings may promptly file in the court below such motions as are appropriate to bring before that court the disqualification issues raised here. If such motions are filed the Chief Judge of the district court may designate a judge to hear and determine said motions and make and enter findings of fact and conclusions of law thereon. The extent of hearings discovery or other proceedings to be allowed preliminary to the entry of such findings and conclusions is committed to the discretion of the designated judge in the first instance.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

R. B. POTASHNICK,

Plaintiff,

versus CA No. 7868-73-H

PORT CITY CONSTRUCTION
COMPANY, INC., et al.,

Defendants.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

Plaintiff,

versus CA No. 7935-73-P

PORT CITY CONSTRUCTION
COMPANY, INC., et al.,

Defendants.

Filed: June 5, 1978

AMENDED OPINION AND ORDER
ON LIMITED REMAND

This action was filed by R. B. Potashnick in the United States District Court for the Southern District of Alabama on October 5, 1973, and assigned to the dock-

et of United States District Judge William Brevard Hand. Potashnick was represented by Paul W. Brock and G. Hamp Uzzelle of the law firm of Hand, Arendall, Bedsole, Greaves & Johnston. After extensive preliminary proceedings the case was brought to trial in August of 1975. Following several weeks of trial with a jury it came to the attention of Judge Hand that Joseph J. Boswell, attorney for Port City Construction Co., Inc., had apparently violated one of the court's standing rules regarding communication with witnesses.[1] A lengthy discussion among counsel and Judge Hand ensued after which it was agreed that in lieu of excluding certain testimony of two of Port City's witnesses or declaring a mistrial, the case would proceed without a jury. Trial was concluded on October 24, 1975, and after extensive briefing by the parties judgment was entered against Port City on March 26, 1976 and altered and amended on May 11, 1976. Port City made a motion for a new trial which was denied and an appeal was taken. Upon the motion of appellant Port City the Fifth Circuit remanded the case for the limited purpose of determining whether Judge Hand was disqualified to act in the case. Port City's motion to vacate judgment and order new trial or in the alternative for a new trial based on the disqualification is presently be-

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1 The rule employed by Judge Hand in jury trials after the rule has been invoked provides:

> The witness will not discuss the case or his testimony with anyone except counsel, then on individual basis, and not in the presence of other witnesses. No one, including counsel, shall discuss with a witness who has not testified another witness' testimony by referring to that witness by name.

(Tr. In Camera Proceedings, P. 44.)

fore this judge, sitting by designation on limited remand.

Port City's motion sets forth seven numbered paragraphs which contain the grounds in support of its claim. The motion can be divided into two points of attack meriting discussion. First, it is claimed that during the pendency of the case Judge Hand was so closely connected with attorneys for Potashnick that his impartiality might reasonably be questioned. This assertion is based upon the affidavit and exhibit of Joseph J. Boswell detailing various business dealings between Judge Hand and Paul Brock and setting out the fact that while the instant action was pending Brock represented Judge Hand in several unrelated matters. The second basis for disqualification alleged by Port City is the fact that Charles C. Hand, Judge Hand's father, is the senior partner in the Hand, Arendall law firm and accordingly had a substantial interest known to the Judge which could have been substantially affected by the outcome of the litigation. There is no claim that Judge Hand was actually impartial or exhibited bias either in favor of or against any of the parties or attorneys.

The Applicable Statute

At the time the action was instituted the applicable statutory provision relating to disqualification of judges provided as follows:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a

substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 USC §455. While the case was pending section 455 was extensively amended to provide a more stringent test for disqualification.[2] The effective date of the

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2 Section 455 as amended provides:

§455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer,

director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purpose of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policy-holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issue only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

amended section was December 5, 1974, with Congress providing that section 455 as amended would not apply:

> to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted prior to the date of this Act.

§3, Pub. L. 93-512. By previous order this court has stated that it was of the opinion that the issues presented here were governed by the amended section 455. Potashnick has moved for reconsideration of this view.

At this point it should be noted that there is a paucity of authority on this question. The reported decisions which have addressed the applicability of the 1974 amendments are not uniform and do not discuss the issue at length. Thus, in *Samuel* v. *University of Pittsburgh*, 395 F.Supp. 1275 (W.D. Pa. 1975), the court found the 1974 amendments to §455 applicable to an action commenced in 1971 largely because the amendments liberalized the procedure in favor of the movant. On the other hand, the act was held not to apply to actions *filed* prior to the effective date in *Duplan Corporation* v. *Deering Milliken, Inc.*, 400 F.Supp. 497 (S.C. 1975). Likewise, the legislative history offers little assistance. It is unclear from the statute or the cases discussing it whether the amendments were intended to apply to actions filed but not actually brought to trial prior to December 5, 1974, or only to cases instituted after that

date. This inquiry is further confused by the fact that the statute states that it does not apply to the "trial of any proceeding" commenced prior to the effective date and defines proceeding as including "pretrial, trial, appellate review, or other stages of litigation." 28 U.S.C. §455(d)(1). However, in *Davis* v. *Board of School Com'rs of Mobile County*, 517 F.2d 1044 (5th Cir. 1975), the Fifth Circuit applied section 455 as amended to an action which was filed but not tried prior to the effective date. Notwithstanding authorities embracing a contrary view[3] this court will follow the rationale implicit in *Davis*. The motion for reconsideration will, therefore, be denied.

The Hand, Arendall Connection

As noted above, the first phase of Port City's motion for a new trial deals with whether Judge Hand was so connected with the Hand, Arendall firm, and in particular Paul Brock, that his impartiality might reasonably be questioned.[4] Joseph J. Boswell, attorney for Port City, has filed a lengthy affidavit with numerous exhibits attached thereto detailing certain business dealings between Brock and Judge Hand during the proceedings in this case. Paul Brock has filed an affidavit in

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3 See, for example, *In Re Continental Vending Machine Corp.*, 543 F.2d 986 (2d Cir. 1976); *In Re Virginia Electric and Power Company*, 539 F.2d 357 (4th Cir. 1976); *Bradley v. Milliken*, 426 F.Supp. 929 (E.C. 1977), all finding the 1974 amendments inapplicable to cases filed but not tried prior to the effective date.

4 After Judge Hand raised the issue of his own initiative *all* lawyers, including Mr. Boswell, specifically waived any objection they may have had to Judge Hand's continuing in the case because of his prior association with the Hand, Arendall firm. (Tr. In Camera Proceedings pp. 16, 17, 26, 27, 36).

response to that of Boswell. The salient facts appear below.

Prior to his appointment to the bench Judge Hand practiced law in Mobile, Alabama. Both he and Brock were partners in the Hand, Arendall firm and enjoyed a friendly relationship which has continued up to the present date. During the time that they were law partners Judge Hand and Brock would occasionally invest with clients and one or more other members of the firm in real estate to be held for future development. Most of these purchases occurred many years ago and before Judge Hand was appointed to the bench. The improved properties have been managed by professional managers or developers with no active management by Judge Hand or Brock. During the period of time this case was before Judge Hand, he and Brock have not jointly invested in property, although there were several transactions involving property in which Judge Hand has a small interest. Those transactions related to an assignment of a mortgage and rents from an apartment building (Boswell aff. pp. 2-3), a conveyance to McDonald Corporation (Boswell aff. p. 6), and several other conveyances of interests in property. (Boswell aff. p. 7). Additionally, in 1973 two lawsuits were filed in Circuit Court in Mobile relating to some property in which Judge Hand and Brock had an interest. The first of these suits was *Blackman, et al* v. *Lurlyne Land Co., Inc., et al.*, Case No. 42,788, filed on October 26, 1973. That case involved property in which Judge Hand had previously held an interest. Judge Hand was not a named defendant and had no connection with the corporate defendants (Brock aff. p. 3); however, the release pre-

pared by Brock to settle the case included Judge Hand. The second action, entitled *Hufstutler, et al.* v. *Lurlyne Land Co., Inc.*, Case No. 43,076, was filed on November 30, 1973. As originally filed this suit did not name Judge Hand as a defendant, but the complaint was amended on March 22, 1976 to add Judge Hand, Brock, and others as defendants. On the day final judgment was entered in *Potashnick*, Brock wrote a letter to all named defendants in *Hufstutler* informing them of the amended complaint and suggesting that they contact their insurance carriers. In that same letter Brock offered to make an appearance on behalf of the defendants to prevent default until they could determine their insurance coverage. On April 21, 1976, Brock filed such an appearance on behalf of all defendants; at that time Judge Hand had already denied the motion for new trial in *Potashnick*.

In applying section 455 as amended in 1974 the Fifth Circuit has noted that it was the intent of Congress to overrule the so-called "duty to sit" cases. *Davis* v. *Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975). The test to be applied in determining whether disqualification is proper is no longer the opinion of the judge, but is based upon a reasonable factual basis. *Davis*, supra. In this regard the comments of the Senate Judiciary Committee are instructive:

> [In] assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are, in fact, seeking to avoid the consequences of his ex-

> pected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into 'reasonable fear' that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

S. Rep. No. 94-419, 93d Cong. 1st Sess. 1973, p. 5 (emphasis in original).

Turning to the facts of the instant case the court finds no reasonable basis for disqualification. The transactions complained of by Boswell relate to small interests in property acquired by Judge Hand during his association with the Hand, Arendall firm. There is no indication that he and Brock or any other member of the firm were actively engaged in investing while the case was pending. It is not uncommon for a lawyer to accumulate interests in property over a period of many years in private practice and it would seem unreasonable to require him to divest himself of those interests, however small, or face the possibility that he must recuse himself when a lawyer who also has a small interest in the same property appears before him. This suit did not involve real estate or any other property in which Judge Hand or Brock had an interest; and it is indeed difficult to imagine that Judge Hand would be impartial because of any interest he shares with Brock or others in investments unconnected with this litigation.

As to the fact that Brock appeared as lawyer or otherwise represented Judge Hand or his interests, as well as other defendants, in litigation during the time this suit was pending, the court is likewise unpersuaded that a reasonable basis for recusal existed. The statute itself does not mandate recusal on this basis. 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3549. While it must be recognized that there have been cases which have required disqualification when this occurs,[5] the court is of the view that in this case where Brock nominally represented Judge Hand in totally unrelated matters in which he and numerous other defendants were involved there is no reasonable basis to question his impartiality.

Charles C. Hand

Port City claims that Judge Hand was disqualified to act in the case because his father is Paul Brock's law partner. This assertion is based upon section 455(b)(5)(ii) and (iii), providing that a judge should disqualify himself when

> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially

5 *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965).

affected by the outcome of the proceeding.

While this motion was pending the Fifth Circuit construed section 455(b)(5)(ii) as requiring recusal only where there was actual participation in the case. *U.S.* v. *Equifax*, 557 F.2d 456 (5th Cir. 1977). It is undisputed that Charles C. Hand did not actually participate in this case and Judge Hand was not disqualified on that basis.

Turning next to the issue of whether Charles C. Hand had an interest known by the Judge that could be substantially affected by the outcome of the litigation, the court notes the facts set forth in the affidavit of Paul Brock. Charles C. Hand is the senior partner of the firm of Hand, Arendall, Bedsole, Greaves & Johnston. At the time Judge Hand was appointed to the federal bench, his father was 80 years old and had limited participation in the affairs of the firm. During the time this case was pending Mr. Hand received a percentage of the income of the firm (1%) but prior to the time judgment was entered in this case his income was changed to a fixed amount unrelated to the income of the firm. The fee received by the firm for its participation in this case has been on a fixed hourly rate from the inception. There have been no other factors involved in the fee and it was not affected by the outcome of the case. The fees accrued have been billed on a monthly basis and have been paid promptly. These factors distinguish this case from the situation presented in *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110 (7th Cir. 1977). Under the circumstances the court cannot say that Charles C. Hand had an interest known to Judge Hand

which could have been substantially affected by the outcome of the case.

ORDER

Based upon the foregoing opinion it is hereby ordered:

1. Potashnick's motion for reconsideration of this court's order of September 30, 1977 is denied.

2. Port City's motion to vacate judgment and order new trial or in the alternative for a new trial is denied.

DONE AND ORDERED this 1st day of June, 1978.

/s/ WILLIAM STAFFORD
WILLIAM STAFFORD
UNITED STATES DISTRICT
JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
1ST DAY OF JUNE, 1978
MINUTE ENTRY NO. 46,529-A
WILLIAM J. O'CONNOR, CLERK
/s/ G. Walter
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-2373
78-2386

D. C. Docket Nos. CA-7867-73-H & 7935-73-P
(Consolidated in D.C.)

R. B. POTASHNICK, an Individual, and
Continental Casualty Company,
Plaintiff-Third Party
Plaintiff, Appellees-
Appellants,

versus

PORT CITY CONSTRUCTION COMPANY and
United States Fidelity & Guaranty Co.,
Defendants-Appellants,

versus

The CITY OF MOBILE, ALABAMA,
Third-Party Defendant-
Appellant, Appellee,

versus

J. B. CONVERSE & COMPANY, INC.,
Third Party Defendant-
Appellee.

UNITED STATES FIDELITY &
GUARANTY COMPANY,
Plaintiff-Appellant,

Port City Construction Company, Inc., et al.,
Defendants-Appellants,

versus

W. D. BRUNSON, d/b/a W. D. Brunson
Construction Company,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Alabama

---

Before COLEMAN, Chief Judge, RONEY and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in Potashnick vs. Port City Construction Co. is hereby reversed and the case is ordered to be retried before a new judge and jury; and

that the judgment in the consolidated action of United States Fidelity and Guaranty Co. v. Brunson is hereby affirmed, in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that appellees, R. B. Potashnick, et al. and J. B. Converse and Co., Inc. pay to appellants, Port City Construction Co., et al. and The City of Mobile and that appellant, U.S. Fidelity and Guaranty Co. pay to appellee, W. D. Brunson the costs on appeal to be taxed by the Clerk of this Court.

January 15, 1980

ISSUED AS MANDATE:

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

FEBRUARY 14, 1980

TO ALL PARTIES LISTED BELOW:

NO. 76-2373 & 78-2386 — R. B. Potashnick, etc. et al. -vs- Port City Construction Co., et al. -vs- City of Mobile, etc. -vs- J. B. Converse & Co., et al. -vs- W. D. Brunson, etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ CLAUDIA NIDES
Deputy Clerk

cc: Mr. Joseph J. Boswell
Mr. John D. Richardson
Mr. William H. Brigham
Mr. G. Hamp Uzzelle
Mr. James H. Lackey
Mr. W. Boyd Reeves
Mr. Broox G. Holmes

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

February 28, 1980

Messrs. Broox G. Holmes
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NOs. 76-2373 - R. B. POTASHNICK, ETC., ET AL
vs.
PORT CITY CONSTRUCTION CO., ET AL
78-2386 - R. B. POTASHNICK, ETC., ET AL
vs.
PORT CITY CONSTRUCTION CO., ET AL

MANDATES STAYED TO AND INCLUDING March 29, 1980

Dear Counsel:

The court has this day granted a stay of the issuance of the mandates to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandates shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court, effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ MARY BETH BREAUX
Deputy Clerk

enc.

cc: Mr. Joseph J. Boswell
Mr. John D. Richardson
Mr. William H. Brigham
Mr. James H. Lackey

APPENDIX H

DISQUALIFICATION OF JUDGES

P.L. 93-512

Extract from

HOUSE REPORT NO. 93-1453

* * * * * *

Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase "in his opinion". This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called "duty to sit" which has become a gloss on the existing statute. See *Edwards* v. *United States* (5th Cir. 1964) 334 Fed. 360. Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a "duty to sit". Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this "duty to sit" would enhance public confidence in the impartiality of the judicial system.

While the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.

At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

* * * * * *

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1522

R.B. POTASHNICK,
CONTINENTAL CASUALTY COMPANY, and
J.B. CONVERSE AND COMPANY, INC.,
Petitioners,

versus

PORT CITY CONSTRUCTION COMPANY,
UNITED STATES FIDELITY AND GUARANTY COMPANY,
and THE CITY OF MOBILE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

OPINION BELOW

The opinion of the Court of Appeals is reported at 609 F. 2d 1101, reh. den. 613 F. 2d 1101 (5 Cir., 1980).

II

JURISDICTION

Respondents adopt Petitioners' statements.

III

QUESTION PRESENTED

The question presented to this Honorable Court is whether any ground exists in the subject action to warrant the granting of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents adopt Petitioners' statement.

V

STATEMENT OF THE CASE

This case was filed by R. B. Potashnick (Potashnick) against Port City Construction Company, Inc. (Port City) and its bonding company, United States Fidelity and Guaranty Company ("USF&G"), on October 5, 1973. Jurisdiction was based upon diversity of citizenship between plaintiff and defendants as provided for in 28 U.S.C. §1332. Port City counterclaimed against Potashnick and his bonding company, Continental Casualty Company, (Continental Casualty), and Potashnick filed third-party complaints on the counterclaim against J. B. Converse

and Company, Inc. (Converse) and the City of Mobile (the City). The City cross-claimed against Converse and counterclaimed against Potashnick.[1]

The case was assigned to the docket of Judge W. Brevard Hand (Judge Hand) and remained on his docket until after trial and final judgement. Potashnick was represented by the law firm of Hand, Arendall, Bedsole, Greaves & Johnston (Hand, Arendall). Paul W. Brock (Brock), a partner in the Hand, Arendall law firm, was chief trial counsel for Potashnick.

The trial of the case commenced on August 4, 1975, before Judge Hand and a jury. During the testimony of the first witness presented by Potashnick, Judge Hand informed counsel for all parties that once a witness had commenced testifying that counsel was not to have any further discussions with the witness until he completed his testimony.[2] No party objected to the judge's rule at the time it was made. Port City's counsel and some of the counsel for other parties did not understand the rule to mean that counsel could not speak with the client during the time the client was testifying as a witness.[3] Thereafter, Port City's counsel violated the rule by discussing with B. G. Quinnelly, president of Port City and an individual defendant in the consolidated exoneration action, his proposed further testimony during a recess which occured between the commencement and completion of Quinnelly's testimony. Potashnick moved to disqualify Quinnelly from testifying due to the violation. During a lengthy hearing in

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[1] The case was consolidated for trial with another proceeding arising out of the same construction project and instituted by USF&G as plantiff against Port City, several individual indemnitors on Port City's bond, and W. D. Brunson, a subcontractor of Port City. The trial court's judgment in this companion case was affirmed by the Fifth Circuit in the decision sought to be reviewed and is not relavant to this petition.

[2] Judge Hand's instruction, as quoted by the Court of Appeals, 609 F.2d at 1117.

[3] Finding of Court of Appeals. 609 F.2d at 1106.

chambers, counsel for Port City also admitted violating another of the court's rules prohibiting counsel from informing a witness who had not testified of the testimony of a prior witness by referring to that witness by name. Counsel for Port City had violated that rule by telling his expert witness the name and substance of the testimony of Potashnick's expert witness for the purpose of eliciting the opinion of its expert as to the opinion of Potashnick's expert's testimony and for getting expert explanation of testimony of Potashnick's expert. Potashnick moved to disqualify that expert witness also. Judge Hand then granted Potashnick's motion to disqualify Quinnelly from testifying further and also granted Potashnick's motion to prohibit Port City's expert witness from testifying on matters with respect to which the court's rule had been violated by telling Port City's expert the name of Potashnick's expert. Judge Hand then said he would be willing to grant Port City a mistrial if Port City so requested and to assign the case to a new judge for trial before another jury if Port City requested. Port City for the reasons stated in the opinion of the Court of Appeals did not accept that offer.[4] Counsel for Port City's bonding company then suggested an alternative of proceeding without a jury. After all other parties and Judge Hand indicated that they would acquiesce in such a procedure, Port City waived its right to jury trial, requested the court to hear the case non-jury, and agreed not to object on appeal to the case being heard non-jury. Trial of the case then resumed, and after 33 days of actual trial the case was concluded. Judgement was entered by the court on March 26, 1976, in favor of Potashnick and Converse and against Port City, USF&G, and the City. A motion for a new trial was filed by Port City and USF&G and denied, and the case was subsequently appealed.

After filing its notice of appeal, Port City filed a motion in the Court of Appeals for a limited remand to allow it to file a motion for a new trial on the ground that the trial judge was unqualified to

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[4] 609 F.2d at 1106 and 1117.

try the case. The Court of Appeals remanded the case and it was ultimately assigned to Judge William Stafford (Judge Stafford) of the Northern District of Florida. After a hearing, Judge Stafford entered an amended opinion on June 1, 1978, denying tne motion for new trial, finding that there was no reasonable basis to question Judge Hand's impartiality and that Judge Hand's father did not act as a lawyer in the proceeding by virtue of his partner acting as a lawyer nor did Judge Hand's father have an interest known to Judge Hand which could have been substantially affected by the outcome of the case.[5] Judge Stafford's order was then appealed and that appeal was consolidated in the Court of Appeals with the earlier appeal from Judge Hand's judgment.

In addressing the findings and conclusions of Judge Stafford on the motion for the new trial based on the ground that the trial judge was disqualified to try the case and in addressing the evidence before the Court of Appeals on that issue the Court of Appeals stated:

> "The motion to disqualify was heard by District Court Judge William Stafford, Jr. of the Northern District of Florida. Based on the affidavits, exhibits, and argument, Judge Stafford found that prior to his appointment to the federal bench, Judge Hand had practiced law in Mobile, Alabama. Judge Hand and Paul Brock had been partners in Hand, Arendall and they enjoyed an ongoing friendly relationship. During the time they were law partners Judge Hand and Brock would occasionally invest with clients and one or more other members of the firm in real estate to be held for future development. Most of these purchases occurred many years ago, prior to Judge Hand's appointment to the bench. The

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[5] Appendix to Petition for Writ of Certiorari at 12d.

improved properties have always been managed by professional managers or developers with no active management by Judge Hand or Brock. During the period of time the Potashnick case was before Judge Hand, he and Brock did not make any joint investments, but several transactions took place involving property in which Judge Hand had a small interest. The transactions included the assignment of a mortgage and rents from an apartment building, and several conveyances of property interests. Additionally, in 1973 two lawsuits were filed in the circuit court of Mobile County relating to some property in which Judge Hand and Brock had an interest. The first of these suits, Blackman v. Lurlyne Land Co., involved property in which Judge Hand had previously held an interest. While the judge was not named defendant and had no connection with the corporate defendants in the action, the release Brock prepared to settle the case included Judge Hand. The second lawsuit, entitled Hufstutler v. Lurlyne Land Co., originally did not name Judge Hand as a defendant, but the complaint was subsequently amended to include Judge Hand, Brock, and others as defendants. On the day final judgment was entered in Potashnick, Brock wrote a letter to all the named defendants in Hufstutler informing them of the amended complaint and suggesting that they contact their insurance carriers. In that same letter Brock offered to make an appearance on behalf of the defendants to prevent default until they could determine their insurance coverage. On April 21, 1976, Brock filed such an appearance on behalf of all defendants; at that time Judge Hand had

already denied the motion for new trial in Potashnick. Amended Opinion and Order on Limited Remand, Record, vol. 7, at 1579-84.

As to the relationship of Judge Hand's father to the Hand, Arendall firm, Judge Stafford found that Charles C. Hand was the senior partner of Hand, Arendall. At the time Judge Hand was appointed to the federal bench, his father was eighty years old and had limited participation in the affairs of the firm. During the time Potashnick was pending Mr. Hand received one percent of the firm's income, but at some point prior to the entry of judgment in the case his income was changed to a fixed amount unrelated to the income of the firm. Judge Stafford's opinion also notes that Hand, Arendall's fee for its participation in Potashnick was at a fixed hourly rate from the inception. Accrued fees were billed monthly and paid promptly. Id. at 1586.

Judge Stafford ruled that the applicable statutory provision relating to judicial disqualification was the amended version of 28 U.S.C. §455. Applying the relevant sections of the statute, Judge Stafford found no reasonable basis for disqualification of Judge Hand . . ."[6]

The Court of Appeals thereafter stated:

". . . The district court found no reasonable basis for disqualification on these grounds, Judge Stafford noting that "it is indeed difficult to imagine that Judge Hand would be impartial [sic] because of any interest he shares with Brock or others in investments unconnected with this litigation." Amended Opinion and Order on Limited

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[6] 609 F.2d at 1106.

Remand, Record, vol. 7, at 1585. We disagree with this conclusion of the district court . . ."[7]

The Court of Appeals thereafter stated:

"[5] In deciding that Judge Hand should have disqualified himself under 28 U.S.C. §455 (a) on the grounds discussed above, we note that "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6355. The amendment of 28 U.S.C. §455 did not alter the standard of appellate review on disqualification issues; (emphasis added) however, the new statute requires a judge to excercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case. Under the prior version of section 455, a judge faced with a close question on disqualification was urged to resolve the issue in favor of a "duty to sit." See Edwards v. United States, 334 F. 2d 360, 362 n. 2 (5th Cir. 1964), cert. denied, 379 U.S. 1000, 85 S. Ct. 721, 13 L.Ed. 2d 702 (1965). The language of the new statute eliminates the so-called "duty to sit." The use of "might reasonably be questioned" in section 455(a) (emphasis added by court) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case. In reviewing the excercise of judicial discretion in this case, we cannot ignore that the disqualification of a judge in any given case does not cause the delay or inconvenience which resulted in

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[7] 609 F.2d at 1110.

> prior times. The growing number of federal judges, and the availability of rapid transportation to move those judges from place to place when necessary, make the decision to disqualify much less burdensome on the judicial system than in times past; any inconvenience which does arise is more than outweighed by the need to protect the dignity and integrity of the judicial process. Our desire to maintain an untarnished judiciary compels us to hold that Judge hand was required by 28 U.S.C. §455(a) to disqualify himself from the Potashnick case, and his failure to do so constituted an abuse of sound judicial discretion. (Emphasis added.)[8]

In addition to presenting for review the issue of the trial judge's disqualification Port City also asserted on appeal that the order of the trial judge prohibiting a client's communication with his or its counsel during the period of time that the client was testifying as a witness impinged upon the civil litigant's right to be represented by hired counsel. Port City and B. G. Quinnelly individually argued on appeal that their federal Constitutional right to be represented by hired counsel in civil litigation was derived from the Fifth Amendment right to due process and the Seventh Amendment right to trial by jury in civil litigation. The Court of Appeals held that the right to retain counsel in civil litigation is implicit in concept of Fifth Amendment due process and that the order of the trial judge prohibiting a litigant from consulting with his attorney during breaks and recesses in the litigant's testimony impinged upon that right. Is so holding the Court of Appeals stated:

> "[15] Recognizing that a civil litigant has a constitutional right to retain hired counsel, we hold that Judge Hand's rule prohibiting a litigant from

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[8] 609 F.2d at 1111.

consulting with his attorney during breaks and recesses in the litigant's testimony impinges upon that right. We draw our support from Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976). In Geders a trial court order prevented the defendant in a federal criminal prosecution from consulting his attorney "about anything" during a seventeen hour overnight recess in the trial between his direct and cross-examination. The Supreme Court held that the trial court order impinged upon defendant's sixth amendment right to the assistance of counsel. 425 U.S. at 91, 96 S. Ct. 1330.

"[16] We note at the outset that certain distinctions can be made between the rights of civil litigants and those of criminal defendants. A criminal defendant's right to counsel arises out of the sixth amendment, and includes the right to appointed counsel when necessary. (Citation omitted.) A civil litigant's right to retain counsel is rooted in fifth amendment notions of due process; the right does not require the government to provide lawyers for litigants in civil matters. (Citation omitted.) A criminal defendant faced with a potential loss of his personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages, and for this reason the law affords greater protection to the criminal defendant's rights.

Notwithstanding the civil-criminal dichotomy, an analogy can be drawn between the criminal and civil litigants' respective rights to counsel. In both cases the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him. (Citation

omitted.) In each instance, the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement. The Geders decision emphasizes the importance of permitting communication between attorney and client during trial recesses.

It is common practice during such [overnight] recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

425 U.S. at 88, 96 S. Ct. at 1335. The need for attorney-client communication is certainly no less in a civil case.

In Geders, as in the instant case, the trial court's controverted order was imposed to avoid possible "coaching" of witnesses. The Geders court noted several alternative ways to avoid improper influences on testimony but concluded that "[t]o the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without intervention of counsel, with the risk of improper 'coaching,' the conflict must . . . be

resolved in favor of the right to the assistance and guidance of counsel." Id. at 91, 96 S. Ct. at 1337. The court in Geders specifically limited its decision to the particular circumstances before it — an order preventing attorney-client consultation "about anything" during a 17-hour overnight recess. 425 U.S. at 91, 96 S. Ct. 1330. Judge Hand's rule in the instant case similarly prohibited "any further conversations" with a witness once his testimony commenced, and the application of the rule barred the president and sole shareholder of defendant Port City from talking to his attorney for a period of seven days, including several overnight recesses. Judge Hand's denial of any attorney-client communication for such an extended period of time resulted in a significant deprivation of the effective assistance of counsel and thus impinged upon Port City's constitutional right to retain counsel."[9]

VI

REASONS FOR DENYING THE WRIT

ARGUMENT 1

28 U.S.C. 455 as amended became effective on December 5, 1974. Section 3 of Pub. L. 93-512, 88 Stat. 1609 provided:

> "This Act (amending this section) shall not apply to the trial (emphasis added) of any proceeding commenced prior to the date of this Act (Dec. 5, 1974), nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this act."

Had it been the Congressional intent that the amendment to 28 U.S.C. 455 should not apply to any proceeding commenced prior

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[9] 609 F.2d at 1118.

to December 5, 1974 it would have been a simple matter to have mandated that it should not apply to any proceeding commenced prior to the effective date of the Act. However it expressly mandated that the amended Act shall not apply to the trial of any proceeding commenced prior to the effective date of the Act. Further, the Court of Appeals specifically addressed the legislative history of the amended Act in arriving at its conclusion that it was the Congressional intent to apply the Act to any proceeding pending in the Court on the effective date of the Act when the trial had not commenced. In footnote 6 of the opinion the Court of Appeals stated:

> "6. The legislative history of amended 28 U.S.C. §455 does provide some support for applying the statute in this case. The sectional analysis set forth in the House Report states that "Section 2 [sic] makes the bill inapplicable to trials commenced and to appellate matters which were fully submitted prior to the effective date of the Act." 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6362. The negative implication of this sectional analysis is that the statute applies to trials commenced subsequent to the effective date, regardless of when the proceeding was instituted. Under this interpretation amended 28 U.S.C. §455 would clearly apply to the instant case, the trial of which commenced in August, 1975."[10]

The Court of Appeals application of 28 U.S.C. 455 as amended effective December 5, 1974 to the trial judge in this cause did not violate the clear Congressional mandate. The trial did not commence until August 4, 1975.

ARUGUMENT 2

In their second argument the Petitioners take issue with the following statement made by the Court of Appeals in its opinion:

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[10] 609 F.2d at 1110.

> . . .; however, tne new statute requires a judge to excercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case. . . . ."[11]

Petitioners argue that the "problem" with the above quoted statement made by the Court of Appeals is twofold.

Petitioners argue that the first "problem" is that the discretion of the trial judge is eliminated by directing which of two alternatives must be chosen. Respondents assume that Petitioners are taking issue with the mandate of the Court of Appeals that if a trial judge has any question about the propriety of his sitting in a particular case then as to the alternatives of exercising his discretion in favor of his "duty to sit" or exercising his discretion in favor of his duty to recuse, he must exercise his discretion in favor of the latter. The language of 28 U.S.C. 455(a) is clear and unambiguous in mandating that the trial judge "shall disqualify himself" if his impartiality "might reasonably be questioned." If the above quoted statement creates any "problem" for a trial judge it was a "problem" created by a clear congressional mandate and not by an erroneous statutory interpretation made by the Court of Appeals.

Petitioners argue that the second "problem" with the above quoted statement is that the Court of Appeals, in directing that a trial judge must exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case, has eliminated or disregarded the statutory requirement that the judge must only disqualify himself if his impartiality might reasonably be questioned. The Petitioners argument concerning the second "problem" is invalid. The Court of Appeals repeatedly recognized that the trial judge is only obligated to disqualify himself if his impartiality might "reasonably be questioned" and in reading the above quoted statement made by the Court of Appeals it must be taken in context with the entire opinion.

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[11] 609 F.2d at 1112.

The Court of Appeals found from the evidence that the relationship between Judge Hand and Potashnick's chief trial counsel, Brock, was of the nature that it gave rise to the impartiality of Judge Hand being reasonably questioned. The Court of Appeals further found that Judge Hand's failure to disqualify himself because of his connection with Brock constituted an abuse of sound judicial discretion. Under their second argument the Petitioners argue in substance that the Court of Appeals erred in finding from the evidence that the connection between Judge Hand and Brock gave rise to a reasonable person, had he been aware of all of the connections, reasonably questioning Judge Hand's impartiality. Respondents reply that the Court of Appeals could not have reasonably arrived at any other conclusion. Further, it is not within the proper function or scope of a petition for a writ of certiorari to ask this Honorable Court to review a decision of a court of appeals on the ground that the court's finding of fact based upon the record on appeal was an erroneous finding.

ARGUMENT 3

In the third argument the Petitioners contend in substance that the Court of Appeals had no legal authority to make an appellate court finding that Judge Hand abused his discretion in failing to disqualify himself because Judge Stafford had made a finding that Judge Hand was not disqualified and that in view of an apparently contended conclusive judicial presumption that Judge Stafford was a reasonable man, the finding of Judge Stafford is conclusive that Judge Hand did not abuse his discretion. Respondents can only reply to Petitioners' argument in that regard by saying that the Petitioners' conclusion is invalid because the premises from which it is deduced are not true. The granting or denial of a motion for a new trial is within the sound judicial discretion of the judge ruling upon it. The Court of Appeals in effect found that Judge Stafford abused his discretion in denying the motion for the new trial.

Petitioners further argue in substance that Port City's failure to

file the motion for a new trial on the ground that the trial judge was disqualified until after final judgment was rendered against it "should be a significant factor in the resolution of the question." The Petitioners made the same argument to the Court of Appeals. The Court of Appeals found from the affidavit of Port City's attorney that although Port City's attorney was at all time aware of the fact that Judge Hand's father was the senior partner in the Hand, Arendall law firm, Port City's attorney did not discover the business relations and other continuing associations between Judge Hand and Brock until the trial of the case was concluded. In addressing that issue the Court of Appeals stated:

> "[10] This court has decided that Judge Hand was disqualified from participating in the Potashnick proceeding on two separate grounds. The judge's business dealings with Paul Brock constituted a ground for disqualification under section 455(a). Had the judge fully disclosed his relationship with Brock on the record, the parties could have waived this ground. During a pretrial conference with the attorneys Judge Hand stated that he was aware that remarks had been made suggesting that he would not be impartial due to his prior association as a partner in the Hand, Arendall law firm. The judge indicated he would favorably consider a motion to recuse himself made by any party. All of the attorneys involved asked Judge Hand not to recuse himself, since recusal would greatly delay trial of the case, all the lawyers knew of the prior association, and the case had been on Judge Hand's docket since October, 1973, and if any attorney had a question about the judge's impartiality a motion should have been filed previously. Under the express language of section 455(e), the pretrial conference proceedings cannot constitute a valid waiver. The judge's disclosure of his prior relationship with Hand,

> Arendall did not reveal the nature of his relationship to Paul Brock. The affidavits submitted as part of the motion to disqualify indicate that Port City's attorney did not discover the Brock-Hand connection until the trial was concluded, so that any waiver of disqualification would not apply to that ground."[12]

Port City did not waive any right to file a motion for a new trial on the ground that the trial judge was disqualified. There was no waiver of disqualification under 28 U.S.C. 455(a) because neither Port City nor its attorney had any knowledge of the continuing associations and connections between Judge Hand and Brock and Judge Hand failed in his duty under 28 U.S.C. 455(e) to disclose his continuing business and professional connections with Brock or with his former law firm or with other former law partners. That being so, he failed to comply with the mandate imposed upon him by 28 U.S.C. 455(a) to disqualify himself if his impartiality might reasonably be questioned.

It is provided in substance in 28 U.S.C. 455(b) that a trial judge shall disqualify himself if any person within the third degree of relationship is acting as a lawyer in the proceeding or when a relative lawyer is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. 28 U.S.C. 455(e) further provides that no judge can accept from the parties a waiver of any ground for disqualification enumerated in 28 U.S.C. 455(b). Potashnick's chief trial counsel, Brock, was a law partner of Judge Hand's father, Charles C. Hand, the senior partner in the Hand, Arendall law firm. Although the Court of Appeals found that Judge Hand's father was not acting as a lawyer in the proceeding it did find that he had an interest that could be substantially affected by the outcome of the proceeding.

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[12] 609 F.2d at 1114.

ARGUMENT 4

The Court of Appeals held substance that it is always assumed that a partner will have some interest in litigation in which his law firm represents a litigant and that if a partner is within the third degree of relationship to the trial judge the relative partner has an interest which is known by the judge that could be substantially affected by the outcome of the proceeding and that under such circumstances a trial judge is mandatorily obligated to disqualify himself in compliance with the mandate of 28 U.S.C. 455(b)(5)(iii). In so holding the Court of Appeals stated:

> "Underlying our decision to disqualify Judge Hand is the assumption that a partner will always have some interest which could be affected by the outcome of a proceeding handled by his law firm. However, a recent advisory opinion interpreting Canon 3C of the Code of Judicial Conduct suggests that apart from any interests involved, the partner status of the judge's relative by itself is sufficient ground for disqualification. Titled "Disqualification in a case in which a relative is employed by a participating law firm," the opinion notes the distinction between law firm associates and partners, and states:
>
> > We believe the following conclusions find support in the Code [of Judicial Conduct]. A judge is disqualified and should recuse if a relative within the third degree of relationship to the judge or his spouse (a) is a partner in a law firm appearing in the case; or (b) will profit or lose from the judge's action in the case either financially or otherwise, for example, the reputation of the firm would be significantly affected by the litigation.
>
> Advisory Committee on Judicial Activities, Advi-

> sory Opinion No. 58 (1978) (emphasis added). The use of "or" in the quoted language above indicates that either an interest or partner status of the relative will require disqualification. The advisory opinion, in conformity with our holding in this case, advocates automatic disqualification of a judge based on his relation to a law firm partner . . ."[13]

The only factual determination which must be made is (1) is a trial judge's relative within the third degree of relationship a partner in a law firm which represents a litigant in a case on the trial judge's docket and (2) does the trial judge have knowledge of the partner's relationship to him. Petitioners argue that the holding of the Court of Appeals is incorrect. Respondents can only reply that the holding of the Court of Appeals is correct.

ARGUMENT 5

In their fifth and sixth arguments the Petitioners argue in substance that the Court of Appeals erred in the following respects:

1. The Court erred in "extending" the holding of this Honorable Court in Geders v. United States, 425 U.S. 80, 47 L.Ed. 2d 592, 96 S. Ct. 1330, (1976).

2. The Court erred in holding that the right of the corporation Port City to be represented by hired counsel had been impinged upon by the trial judge's order limiting the right of its sole officer and stockholder, B. G. Quinnelly, to communicate with counsel for a period of approximately seven days due to the fact that Port City's bookkeeper and office manager had the right to communicate with Port City's counsel during the testimony of B. G. Quinnelly.

3. The Court of Appeals "violated the most fundamental rule of appellate procedure" in reversing the case based upon its "extention" of the rationale of Geders because (a) no objection was made to the court's order limiting the client's right to communi-

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[13] 609 F.2d at 1114.

cate with counsel at the time the order was made or at any subsequent time and (b) the trial court offered Port City a mistrial at the time it became apparent to Port City that the trial judge's order included a prohibition of communication with the client as well as non-party witnesses and Port City refused to accept the offered mistrial.

The exoneration action filed by USF&G was consolidated for trial with the action commenced against Port City by Potashnick. B. G. Quinnelly and Marie Quinnelly were individual defendant's in the exoneration action. Therefore, when B. G. Quinnelly took the stand to testify during the trial he was testifying in his dual capacity as the sole officer and stockholder of Port City and on his own behalf as an individual defendant. Port City's bookkeeper and office manager, Marie Quinnelly, also testified in such dual capacity. The Court of Appeals did not address the fact of B. G. Quinnelly and Marie Quinnelly testifying as individual defendants but limited its opinion to addressing the issue of whether the prohibition of communication by the sole officer and stockholder of Port City during his testimony impinged upon the corporation's constitutional right to be represented by hired counsel. The Court of Appeals correctly held that the fact that the corporation's bookkeeper and office manager could communicate with the corporation's counsel during the testimony of the sole officer and stockholder did not cure the error of impinging upon the corporation's right to communicate through its officers with corporate counsel.

The Court of Appeals did not "extend" the principle of law pronounced by this Honorable Court in Geders it simply correctly applied the principle of law to the facts of this case.

Petitioners argue in substance that the issue that Port City was denied its federal constitutional right to be represented by hired counsel was not properly considered on appeal because no objection was made to the trial court's order that the president of Port City (and the other individual defendants who were included in the designation "Port City,") could not communicate with

counsel about their testimony for so long as they were testifying as a witness. Petitioners made the same argument to the Court of Appeals.

Rule 46 of the Federal Rules of Civil Procedure (FRCP) provides in substance that a party, at the time the order or ruling of the court is made, must make known to the court his objection to the order or ruling and his grounds therefor; and if a party has no opportunity to object to an order of the court at the time it is made, the absence of an objection does not thereafter prejudice him. Rule 61 FRCP provides in substance that no error in any ruling or order by the court is ground for disturbing a judgment unless refusal to disturb the judgment appears inconsistent with substantial justice, and the court must disregard any error that does not affect a substantial right of a party. The United States courts of appeals act in accordance with Rule 61 FRCP. In addition, 28 U.S.C. 2111, which applies to appellate courts, states a principle which is in substance the same as Rule 61 FRCP. Bell v. Swift and Company, 283 F. 2d 407 (5 Cir. 1970); Wright and Miller, Federal Practice and Procedure, Vol. 11, Rule 61, Section 2882, Page 273.

The court's order denying Port City the right to communicate with counsel through B. G. Quinnelly, its president and sole stockholder, for so long as B. G. Quinnelly was testifying as a witness, was plain error affecting a substanial federal constitutional right. The order prohibiting such communication was properly considered on appeal even in the absense of objection thereto. Federal Rules of Evidence, Rule 103; Harris v. Smith, 372 F. 2d 806 (8 Cir. 1967). In considering the issue raised by Port City pertaining to denial of right to be represented by counsel it was necessary for the Court of Appeals to answer the following questions, which were argued in brief to the Court of Appeals:

QUESTIONS

1. Does a party in civil litigation have a federal constitutional right to be represented by hired counsel? If so;

2. Did the trial court's order restricting or limiting a party's right

to communicate with counsel deny or impinge upon that right? If so;

3. Did counsel's failure to object to the order when it was made, under the circumstances of this case, constitute a waiver of the error under Rule 46 FRCP?

4. Does the order constitute plain error? If so;

5. If the order does constitute plain error, did it affect a substantial right of the Respondents, or was it harmless error?

ANSWERS TO QUESTIONS

1. The 6th Amendment to the Constitution of the United States of America guarantees a defendant in a criminal prosecution a right to be represented by counsel. Respondents argued that they have a constitutional right to be represented by hired counsel in a civil litigation by virtue of the 5th and 7th Amendments to the United States Constitution.

The 5th Amendment to the Constitution provides, among other things, that no person shall be deprived of life, liberty, or property without due process of law. In Watson v. Towbridge, 382 F. 2d 807 (2nd C.C.A. 1967) the court stated on page 811 of the decision in part:

> ". . . Nevertheless, the flexibility which is inherent in the concept of due process of law precludes the dogmatic application of specific rules developed in one context to entirely distinct forms of government action. 'For thou "due process" generally implies and includes actor, reus, judex (emphasis added by court) regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, (emphasis added) . . . yet, this is not universally true' . . . (Citations omitted.)

In Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S. Ct. 792 (1963) the Supreme Court of the United States ruled that the 6th Amendment right to counsel in criminal cases was one of those amendments included in the Bill of Rights which is funda-

mental and essential to a fair trial and therefore the 6th Amendment right to counsel was imposed upon the States by the 14th Amendment. In so holding the court stated on page 805 of the Lawyers Edition:

> ". . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:
>
> > 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be *heard by counsel.* (373 US 345) Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of

> counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'
> (Citations omitted.)

Of course we are not here concerned with the question of whether or not a party is entitled to have counsel appointed for him in a civil case when he is sued and thereby put in jeopardy of losing his property. The only issue raised in the Court of Appeals is a party's right to be represented by hired counsel in civil litigation and the limits or restrictions which may properly be placed upon that right by the trial court. Can it reasonably be said that the necessity of an attorney in civil litigation is any less important than in a criminal prosecution? In one a party is in jeopardy of losing his liberty and in the other he is in jeopardy of losing his property. Also, if due process includes the right to a trial according to some settled course of judicial proceedings and also includes all rights which are fundamental and essential to a fair trial, then a party in a civil case is entitled to be represented by counsel by virtue of the 5th Amendment. It is definitely a settled course of judicial proceedings in civil litigation to have the right to be represented by counsel and that right is as fundamental and essential to a fair trial in civil cases as it is in criminal cases.

In John A. Geders v. United States, 425 U.S. 80, 47 L.Ed. 2d 592, 96 S. Ct. 1330, this Honorable Court ruled that a district court judge's order that a defendant in a criminal case could not talk to his attorney during a seventeen hour overnight recess impinged upon the defendant's right to be represented by counsel as guaranteed to him by the 6th Amendment. In this case the Court's order deprived Port City and B. G. Quinnelly individually of the right to confer with their attorney about their testimony for a period of approximately seven days while B. G. Quinnelly was testifying as the only officer and sole stockholder of Port City and testifying in his individual behalf as an individual party defendant

in the consolidated exoneration action filed by USF&G and deprived Port City and Marie Quinnelly of the right to confer with their attorney for a period of approximately two days while Marie Quinnelly testified as the bookkeeper of Port City and in her individual behalf as a party defendant in the exoneration action. In Geders this Honorable Court stated on page 599 of the Lawyers Edition:

> "The recess at issue was only one of many called during a trial that continued over 10 calendar days. But it was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill equipped to understand and deal with the trial process without a lawyer's guidance.
>
> 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. ... (A defendant) is unfamiliar with the rules of evidence ... He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings

against him.' Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

This Honorable Court further stated on page 601:

> "The challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel. We need not reach, and we do not deal with, limitations imposed in other circumstances. We hold that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."

In a separate concurring opinion, Justices Marshall and Brennan stated on page 602:

> "The only justification expressly considered by the Court in its opinion is the desire to avoid the risk of unethical counselling by an attorney. The Court holds that the fear of unethical conduct is not a sufficient ground for an order barring overnight communication between a defendant and his attorney, and the same would hold true absent the most unusual circumstances, I take it, for an order barring consultation between a defendant and his attorney at any time before or during the trial. If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. (Emphasis added.) If any order barring communication between a defendant and his

> attorney is to survive constitutional inquiry, it must be for some reason other than a fear of unethical conduct.'

See also: U.S. v. Allen, 542 F. 2d 630 (4 Cir. 1976)

Port City argues that the record on appeal affirmatively discloses that Port City's motion to discharge the jury and agreement not to assign the loss of the jury as error on appeal was made under duress and was not a valid waiver made under circumstances whereby Port City's attorney had any real choice. Even the trial judge recognized that Port City was given a "Hobson's choice." (Tr.4582) However, even if there was an effective waiver of Port City's right to a trial by jury, which Respondents deny, nevertheless, the court thereafter prohibited Respondents from talking with their counsel about their testimony and case for a period of approximately seven days and two days, respectively, even after the jury was discharged. To preclude Respondents from talking about their "testimony" was to preclude Respondents from talking to their counsel about the merits of their case at all. In a case of this magnitude which involved the number of issues involved it was impossible to anticipate everything which may be raised during direct examination of a party or examination or cross-examination of a party prior to the time such direct examination or cross-examination commences. It is necessary for a lawyer to have continuing communication with his client in order to effectively represent the client and it is necessary for the client to have a right to continuing communication with his attorney in order to assist the attorney and to have the fulfillment of the right to counsel as guaranteed by the Constitution of the United States. The trial judge's order was designed to prevent coaching of the witness on the part of the lawyer. As Mr. Justice Marshall said in his concurring opinion in Geders:

> ". . . If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client . . ."

The trial judge did not make such assumption. The trial judge's

order denied Respondents their constitutional right to be represented by counsel in civil litigation. This Honorable Court in Geders held that when the constitutional right to be represented by counsel is violated it is not necessary to show prejudice because prejudice is presumed. However, in this case no greater prejudice could have been shown than the fact than an unintended violation by Port City's attorneys of the trial judge's unconstitutional order prohibiting the witness-client from communicating with his attorney resulted in Respondents being deprived of their constitutional right to a trial by jury.

2. Port City (and the other individual defendants B. G. Quinnelly and Marie Quinnelly) were prohibited for a period of days from communicating with their counsel about their "testimony." The prohibition effectively prohibited them from communication with counsel about their case because a discussion of any aspect of the case would have pertained to matters to which they had already testified or may or would be expected to testify in their further examination as a witness. The principle of law pronounced in Geders v. United States, supra, is controlling in this case. Therefore, Respondents' right to the effective assistance of counsel was impinged upon by the trial judge's order.

3. Port City's counsel did not object to the order when it was made because the order was not understood to restrict or limit communication with the client. Therefore, it had no opportunity to object to the order until it was too late. Under these circumstances, even if an objection was necessary, by the express provision of Rule 46 FRCP, the absense of an objection did not prejudice the right of Port City to have the order of the trial judge reviewed on appeal.

4. The restriction or limitation of a party's right to communicate with counsel is a federal constitutional error, and all federal constitutional errors are plain error and may be reviewed on appeal, even though not objected to at the trial court. Harris v. Smith, supra; Federal Rules of Evidence, Rule 103; Chapman v. California, 386 U.S. 18, 17 L. ed. 2d 705, 87 S. Ct. 824, reh. den. 386 U.S. 987, 176 L. ed. 2d 705, 87 S. Ct. 824 (1967).

5. Although all federal constitutional errors constitute plain error, nevertheless, a federal constitutional error may be harmless error. It is a harmless error if it does not affect a substantial constitutional right of the complaining party. However, before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California, supra. The impingement upon a party's constitutional right to the assistance of counsel is the denial of a substantial right as a matter of law and prejudice is presumed to have resulted from the unconstitutional order. Geders v. United States, supra. In this case the record affirmatively reflects that Port City was placed in the position of (1) losing the essential testimony of the client, or, (2) losing its jury or (3) suffering a mistrial after approximately seven weeks of trial, because of its counsel's violation of the trial court's unconstitutional order (which was unintentional because the order was not understood to limit communication with the client). Therefore, the Court of Appeals did not have to indulge in any presumption of prejudice. Actual prejudice was affirmatively disclosed by the record on appeal.

Even though Port City declined the offer of a mistrial the trial judge thereafter presisted for the remainder of the non-jury trial in enforcing his order limiting communication with counsel by the client.

ARGUMENT 6

28 USC 455 as amended effective December 5, 1974 did not alter the standard of appellate review on disqualification issues. The standard of appellate review has at all time been a determination of whether there was an abuse of sound judicial discretion. 28 USC 455(b) as amended specifies certain grounds of disqualification for which a trial judge can not accept a waiver. The Court of Appeals held in effect that the trial judge was disqualified because his father was the law partner of Brock, Potashnick's chief trial counsel, and that consequently Judge Hand's father had an interest known to Judge Hand which could be substan-

tially affected by the outcome of the proceeding. Therefore, Judge Hand abused his discretion in failing to disqualify himself under 28 USC 455(b)(5)(iii). However, prior to the amendment of the Act 28 USC 455 mandated that a trial judge shall disqualify himself if he was so related to or connected with any party or his attorney as to render it improper, "in his opinion," for him to sit on the trial. The Court of Appeals found that Judge Hand was so related to or connected with Brock as to render it improper for him to sit on the trial and that notwithstanding "his opinion" to the contrary Judge Hand abused his sound judicial discretion in refusing to disqualify himself. Under the facts of this case, because of the Judge Hand-Brock connection, the Court of Appeals found that Judge Hand abused his sound judicial discretion and the case for that reason was due to be reversed under 28 USC 455 in effect on the date the action was commenced or as amended effective December 5, 1974. Therefore, since under the facts of this case Judge Hand should have disqualified himself under either statute a determination by this Honorable Court as to whether the Court of Appeals erroneously applied the amended Act to the trial judge would be a purely academic determination.

ARGUMENT 7

The amended version of 28 USC 455 became effective on December 5, 1974. Notwithstanding a conflict among the courts of appeals as to the proper application of 28 USC 455 as amended to trial judges in the courts of appeals the lapse of time from the effective date of the statute to the present date has for all practical purposes rendered moot the issue of whether the Act applied to trial judges in all cases where the trial had not commenced or whether it applied to all proceedings commenced subsequent to the effective date of the amended statute. A decision by this Honorable Court on that issue may have academic significance but it would have no substantial significance to any existing or future cases.

VIII

CONCLUSION

For the reasons argued hereinabove Respondents respectfully submit that the petition for Writ of Certiorari is due to be denied. The interest of USF&G on the issues raised in the petition for Writ of Certiorari are identical to the interest of Port City and USF&G therefore joins Port City in making this joint response to the petition for Writ of Certiorari.

Respectfully submitted.

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CERTIFICATE OF SERVICE

We hereby certify that pursuant to the Supreme Court Rules we have this 29th day of May, 1980, served copies of this Brief in Opposition to Petition for Writ of Certiorari by mailing copies of the same to G. Hamp Uzzelle, Esq., Broox G. Holmes, Esq. and William H. Brigham, Esq. at their correct mailing addresses by United States Mail, first class postage prepaid.

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